Supreme Court, U.S.
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No. _____

# IN THE
# SUPREME COURT OF THE UNITED STATES

EL BANCO DE SEGUROS DEL ESTADO,
*Petitioner*,

v.

EMPLOYERS INSURANCE OF WAUSAU,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

This lawsuit involves the purported service of a Petition to Compel Arbitration upon Petitioner El Banco de Seguros del Estado, a Foreign State, as defined by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1603, and which in §1608(b) mandates actual notice by service of a summons and complaint upon the Foreign State of any court proceeding against it. The Court of Appeals for the Seventh Circuit deemed actual notice by combining constructive notice with principles of agency and partnership law. If this Court does not accept this Petition, then not only will due process protection of Foreign Sovereign States before U.S. Courts be diminished, but also, in this case, an original arbitration award in the amount of $181,319 against Petitioner Foreign State, which the Petitioner could have satisfied within 45 days of the award if it had received notice, will be enforceable as a judgment calling for payment of $181,319 plus 7.5% interest as of September 18, 1995, $930,730 in attorneys' fees and costs, and the posting of a $9,000,000 letter of credit in favor of Respondent, all as a result of an arbitration in which the Petitioner was unable to participate.

May a Circuit Court of Appeals combine principles of agency and partnership law to deem actual notice from constructive notice, thereby deliberately ignoring long standing Supreme Court and Circuit Court decisions and Congress' clear mandate in FSIA, 28 U.S.C. §1608, all of which establish that service of process upon a Foreign State has to be done in a manner that assures that the Foreign State receives actual notice of the pendency of any court action against it, and thereby confirm an arbitral award against said Foreign State when it never received the FSIA's required notice of the state court proceeding which compelled the arbitration in the first place?

## PARTIES TO THE PROCEEDINGS

### Petitioners

Petitioner, El Banco de Seguros del Estado is the State Insurance Bank of Uruguay, with its principal place of business in Montevideo, Uruguay. It is an agency or instrumentality of the Sovereign Republic of Uruguay. See Certificate of Interest, Appendix D at 43a.

### Respondents

Respondent, Employers Insurance of Wausau, a Mutual Company is an insurance company organized under the laws of the State of Wisconsin.

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## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 199 F.3d 937 (3rd Cir. 1999) A copy of the Opinion is included in the Appendix at Appendix At 1a. The Opinion of the District Court for the Western District of Wisconsin is unpublished and is included in Appendix at 22a.

## JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its Opinion on December 15, 1999. On December 28, 1999, Petitioner filled a Petition for Rehearing *En Banc* which the United Staes Court of Appeals denied on January 19, 2000 (App. D at 43a). The Petition for Writ of Certiorari is filed within 90 dyas of the denial of the Petition for Rehearing *En Banc*. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

U.S. Const Art. I, Sec. 8, Cl. 3
Commerce Clause

The Congress shall have Power . . .

To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.

* * * * *

U.S. Const. Art. VI, Cl 2

Supremacy Clause

The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, in Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

The Foreign Sovereign Immunities Act

28 U.S.C. §1330 See App. E at 47a

28 U.S.C. §1603 See App. E at 50a

28 U.S.C. §1604 See App. E at 51a

28 U.S.C.§1608 See App. E at 60a

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INTER-AMERICAN CONVENTION ON
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("Inter-American Convention")

9 U.S.C.§301 -07 See App. F at 67a-68a

* * * * *

CONVENTION OF THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS ("The New York Convention")

9 U.S.C. §201 - 07 See App. G at 74a

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Wisconsin Statutes §601.73 See App. H at 88a

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Wisconsin Statutes §788.03 See App. I at 90a

* * * * *

Wisconsin Statutes §801.09 See App. J at 92a

## STATEMENT OF CASE

Petitioner, El Banco de Seguros del Estado ("Banco"), at all times was and is the State Insurance Bank of Uruguay, with its principal place of business in Montevideo, Uruguay. It is an agency or instrumentality of the Sovereign Republic of Uruguay, and as such, is a foreign state, as the term is defined by the FSIA, 28 U.S.C. §1603. Respondent, Employers Insurance of Wausau, a Mutual Company ("Wausau") is an insurance company organized under the laws of Wisconsin.

A brief chronology of events is necessary in order to place the questions presented herein in their proper context. Between 1966 and 1973 Wausau entered into a series of contracts, on a world-wide market, known as Excess

Retrocessional Reinsurance Treaties ("Treaties") with Certain Underwriters at Lloyd's, London, and with certain other retrocessional reinsurers, including Petitioner Banco. Collectively the retrocessional reinsurers were known as the "Retrocessionaires." Each Retrocessionaire entered into their own individual Treaty(s) with Respondent and was to reimburse the Respondent for the percentages specified in its Treaty(s) for the direct reinsurance losses paid by Respondent, as long as these losses were within the Treaty's coverage provisions.

A dispute arose between Respondent and Certain Underwriters at Lloyd's, London, and some of the other Retrocessionaires (there is nothing in the record which proves that Banco was aware of this dispute) as to whether proofs of losses that Respondent had been submitting to Lord, Bissell & Brook ("LBB"), counsel for Certain Underwriters at Lloyd's, London, since 1984, were within the coverage provisions of these Treaties. Respondent caused a Demand for Arbitration to be sent to LBB, counsel for Certain Underwriters at Lloyd's, London, and most but not all of the Retrocessionaires (and certainly it did not represent Banco).

Thereafter, an impasse arose regarding Respondent's Arbitration Demand. In order to resolve this impasse, Respondent filed and served a Petition to Compel Arbitration pursuant to Wisconsin Statute §788.03. This is a special proceeding under Wisconsin law and does not require the service of a summons and complaint.[1] In 1991 Respondent

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[1] However, the Petition is to be served in the same manner as provided by law for the service of a summons. See, App. H and App. J for procedure for service of a summons and for contents of a summons under the laws of Wisconsin.

caused process to be served upon the designated agents set forth in the Treaties Service of Suit Clause. It is this service which is at the heart of the controversy raised herein. This Petition resulted in protracted litigation. As Banco had no knowledge of this litigation it was not able to participate in same and was therefore denied the opportunity to remove it into federal court.

After said protracted state court litigation was concluded, the parties before the court were ordered to go forward with the arbitration proceedings. The arbitration took place during the summer of 1995, more than four years after the original demand had been made and also more than four years after the state court proceedings were commenced. The Panel entered a full and final award in the amount of $7,783,244.[2]

The Panel's award further provided for a 45 day grace period for each of the Retrocessionaires to pay their respective share of the award. Those who failed to pay in a timely manner were subject to the following sanctions: 1- 7.5% interest as of September 18, 1995; 2- Joint and several liability for attorneys' fees and costs; and, 3- The posting of a $9,000,000 letter of credit to insure the Retrocessionaires' ultimate liability under the award.

There is nothing in the record which would prove that Banco ever received actual notice of the Arbitration Demand, the Petition to Compel Arbitration, the ensuing litigation, the Order compelling Arbitration, the Panel's Final Award and/or

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[2] Banco's share of this award was ultimately determined to be $181,319, although neither Banco's name or share appeared in the award itself.

the litigation following the Award. Banco did not appear or participate in any aspect of the arbitration or litigation concerning same. Nor was it ever afforded the 45 day grace period in which to pay its share of the award, although at a later date when Banco learned of the award, it offered to pay the sum awarded against it, the $181,319.

In July of 1998, Respondent filed a Petition to Confirm its arbitral award against Banco in the United States District Court for the Western District of Wisconsin pursuant to the Inter-American Convention, 9 U.S.C. §§301-07 (at the very end of the three year statute of limitations period) and the New York Convention, 9 U.S.C. §§201-07. The District Court had jurisdiction pursuant to these two Conventions, as well as pursuant to the FSIA 28 U.S.C. §1330. It should be noted that in this instance Respondent Wausau complied fully with the requirements of the FSIA 28 U.S.C. §1330, 1608, serving the requisite notice upon Banco, which thereafter appeared and participated in the federal court proceedings. Banco, alleging that it never had received actual notice of the Arbitration Demand, the Petition to Compel Arbitration, the ensuing litigation, the Order compelling arbitration, the arbitration itself, the award itself and the ensuing litigation, moved to vacate the award pursuant to Article V(b)(1) of the Inter-American Convention. The District Court ultimately denied Banco's motion and confirmed the award on January 5, 1999.

Petitioner filed a timely appeal with the Court of Appeals for the Seventh Circuit. On December 15, 1999 the Court of Appeals affirmed the District Court's judgment. Petitioner filed a timely Petition for Rehearing *en Banc*, which was denied on January 19, 2000.

Petitioner Banco has filed a timely Petition for Certiorari to the United States Supreme Court based upon the issues and argument presented herein.

## ARGUMENTS FOR GRANTING CERTIORARI

The issues involved in this case go to the very core of the American Constitution and its judicial system. What is at stake is whether rights conferred upon a foreign state by the Inter-American Convention, the New York Convention and the FSIA can be swept away by judicial activism which equates constructive notice plus principles of agency and partnership law with actual notice. The result of this legal fiction is to subject a foreign state to a judgment in excess of $9,000,000 stemming from an initial arbitral award of $181,319 when the foreign state never received actual notice of the arbitration in the first place.

The published decision of the Court of Appeals not only deviates from a clear Congressional mandate, but also conflicts in principle and undermines the precedential value of the Supreme Court decisions in *Verblinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 103 S.Ct. 1962 (1983), *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct.652 (1950), *Schroeder* v. *City of New York*, 371 U.S. 208, 83 S.Ct. 279 (1962), *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 84 S.Ct. 411 (1964), *Phillips Petroleum Company v. Shutts*, 472 U. S. 797, 105 S.Ct. 2965 (1985) and of the Circuit Courts of Appeals decisions in *Sherer* v. *Construcciones Aeronauticas, S.A.*, 987 F.2d 1246 (6th Cir. 1993) *cert. denied*, 510 U.S. 818, 114 S.Ct. 72 (1993), *Antoine* v. *Atlas Turner*, 66 F.3d 105 (6th Cir. 1995), *Harris Corp.* v. *National Iranian Radio and Television*, 691 F.2d 1344 (11th Cir. 1982), *Velidor* v. *L/P/G Benghazi*, 653

F.2d 812 (3rd Cir. 1981), *cert. denied*, 455 U.S. 929, 102 S. Ct. 1297 (1981), *Obenchian Corp.* v. *Corporation Nacionale de Inversiones*, 656 F. Supp. 435 (W.D. Pa. 1987), aff'd in part and rev'd in part, 898 F.2d 142 (3rd Cir. 1990), *Gray* v. *Permanent Mission*, 443 F. Supp. 816 (S.D.N.Y. ), aff'd 580 F.2d 1044 (2nd Cir. 1978) and *Alberti* v. *Empresa Nicaraguense De La Carne*, 705 F.2d 250 (7th Cir. 1983).

The need for judicial guidance from this Court is acute. The issue addressed herein, the scope of proper service on a foreign sovereign is believed to be of first impression for this Court and is of exceptional federal and international importance.

## ARGUMENT I

### Banco did not waive its right to "notice reasonably calculated."

The chain of events leading to the instant Petition for Certiorari was put into motion by Respondent Wausau's method and manner of serving process and commencing a state court proceeding denominated as a "PETITION TO COMPEL ARBITRATION AND NOTICE OF APPLICATION FOR ORDER COMPELLING ARBITRATION." [Emphasis in original.] The caption of the PETITION indicated that it was directed to "CERTAIN UNDERWRITERS AT LLOYD'S, LONDON and CERTAIN LONDON MARKET INSURANCE COMPANIES, including those identified in the Appendix.[3]

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[3] See App. K at 94a which contains the instant Petition to Confirm and its exhibits. One of the exhibits is the original Petition to

While it is true that Respondent Wausau initially served a Demand for Arbitration on "Certain Underwriters at Lloyd's, London," there is nothing in the record below which would establish that Banco ever received said Arbitration Demand, or that Banco was aware of said Demand. As a matter of fact, the Court of Appeals noted that that the Treaty's Arbitration Clause did not "specify what procedures would be used in the event of an arbitration." See App. A at 2a. It also noted that "[T]here is no evidence in the Treaties between Banco and Wausau of any special notification procedure to be followed in the event of any arbitration." See App. A at 10a.

The PETITION TO COMPEL ARBITRATION was ostensibly served pursuant to the Treaties' Service of Suit Clause. The Court of Appeals did note that "Wausau argues that by designating special agents for service of process Banco has waived its right to notice reasonably calculated to apprise it of the pending arbitration." See App. A at 11a. It is respectfully submitted that by raising this argument the Respondent has thereby, as a bare minimum, tacitly acknowledged that it did not provide Banco with the requisite notice. The Seventh Circuit Court of Appeals rejected Respondent's argument when it held that, "We find that Banco's designation of an agent for service of process did not constitute a waiver of its right to notice reasonably calculated to allow it to be heard." See App. A at 12a.

By stating its finding in this manner, the Court of Appeals was acknowledging that Banco was entitled to receive

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Compel and a review of it demonstrate that in Wausau's mind the term "London" covered all of the retrocessionaires; however this "London Umbrella" only existed in Wausau's mind.

the type of notice that this Court held to be "an elementary and fundamental requirement of due process," in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950).

There are two other factors which impinge upon the notice requirement to be applied herein. The first is that since Respondent commenced its Petition to Confirm in the District Court pursuant to the Inter-American Convention, 9 U.S.C. §301 *et seq.* , and the New York Convention, 9 U.S.C. §201 *et seq.*,[4] the courts construing the notice requirements of these two Conventions have required that actual notice, measured by the due process standards of the forum state, be employed. See, *Bergessen* v. *Joseph Miller*, 710 F. 2d 928 (2nd Cir. 1983), *Productos Mercantiles* v. *Faberge, USA*, 23 F.3d 41(3rd Cir. 1994), *Parsons & Whittemore Overseas* v. *Societe Generale de L'Industrie du Papier*, 508 F.2d 969 (2nd Cir. 1974) and *Iran Aircraft Industries* v. *Avco Corp.*, 980 F.2d 141 (2nd Cir. 1992). The second factor is that Banco was and is a foreign sovereign. This of necessity brings into play the appropriate provisions of the FSIA, which will be discussed more fully below. For now it is sufficient to note that with the exception of the decision below, the courts have consistently required that a foreign sovereign be served with process in a manner that results in said foreign sovereign receiving actual notice of the pendancy of the court action before the courts can obtain subject matter jurisdiction and personal jurisdiction over said foreign state.

Therefore, the requisite notice must meet both the due process standards of being "notice reasonably calculated" as

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[4] Banco agrees with the "technical point" analysis to be found in footnote in App. A at 9a.

set forth by this Court in *Mullane*, *Ibid.*, along with those imposed by the FSIA before a foreign state such as Banco can properly be brought before the courts of this country.

## ARGUMENT II

### As a Foreign State Banco was entitled to receive notice of process pursuant to the FSIA

While at first blush this case appears to be quite complex, as it involves the application of provisions from the Inter-American Convention, the New York Convention and the FSIA (and the case law construing same), as well as interpreting contractual provisions from the Retrocessional Treaties, provisions from the Wisconsin Statutes, all of which are to be measured against the backdrop of the due process standards of Wisconsin and the United States. It is respectfully submitted, however, that when one applies the proper analysis to this lawsuit, most of the issues and complexities disappear.

It is further submitted that as Petitioner Banco was and is a foreign state, that the scope of this analysis is provided by the FSIA and this Court's examination of the FSIA in *Verblinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 103 S.Ct. 1962 (1983). In setting out the history behind the FSIA, this Court noted the following, *Id.* at 488:

> In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to *"assur[e] litigants that . . . decisions*

> *are made on purely legal grounds that insure due process,"* H.R. Rep. No. 94-1487, p. 7 (1976), reprinted in [1976] U.S. Cong. & Ad. News 6604. To accomplish these objectives, the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities. [Emphasis added.]

The Court goes on to note that the FSIA provides that "its standards control in the 'courts of the United States and in the States.' *Id.* at §1604, and thus suits against foreign sovereigns could be brought in either forum." *Id.* at 489. In *Argentine Republic* v. *Amerada Hess Shipping Corporation,* 488 U. S. 428, 434, 109 S.Ct. 683 (1989) the Court followed up on this by declaring that "[W]e think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts."

This Court further notes that by virtue of its authority over foreign commerce and foreign relations, "Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States." *Verblinden, supra.*, at 493. It then goes on to state that, *Id.* at 493 - 94:

> To promote these federal interests Congress exercised its Article I powers [FN19] by enacting a statute comprehensively regulating the amenability of foreign nations to suit in the United States. The statute must be applied by the District Courts in every action against a foreign sovereign, since subject matter

> jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign immunity. 28 U.S.C. §1330(a) [FN20]. At the threshold of every action in a District Court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies -- and in doing so it must apply the detailed federal law standards set forth in the Act. Accordingly, an action against a foreign sovereign arises under federal law, for purposes of Article III jurisdiction. [FN 19 omitted.]
>
> FN20. The House Report on the Act states that "sovereign immunity is an affirmative defense that must be specially pleaded." H.R. Rep. No. 94-1487, at 17. Under the Act, however, subject matter jurisdiction turns on the existence of an exception to foreign sovereign immunity. 28 U.S.C. §1330(a). Accordingly, *even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the Act.* [Emphasis added.]

In concluding its analysis of the FSIA, this Court set forth the Following, *Id.* at 496 - 98:

> [T]he Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns maybe held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign

> immunity as an aspect of substantive federal law [citations omitted], and applying these standards will generally require interpretation of numerous points of federal law. . . .
>
> * * * * *
>
> [A]s we have made clear, deciding whether statutory subject matter jurisdiction exists under the Foreign Sovereign Immunities Act entails an application of substantive terms of the Act to determine whether one of the specific exceptions to immunity applies.

On the basis of the *Verblinden* analysis, it is apparent that the FSIA is the exclusive basis for bringing a foreign sovereign before the courts of the United States, whether federal or state. The courts must initially determine whether or not they have subject matter jurisdiction and personal jurisdiction over the foreign state. In making this determination both federal and state courts must apply federal substantive law as codified in the FSIA itself. Consequently, the constraints placed upon the United States District Courts, discussed above, would apply to state courts as well, since they too will have to apply the very same substantive federal law, in making said initial determination. It is further submitted that the italicized language quoted above in Footnote 20 of the *Verblinden* decision is also applicable to a state court proceeding against a foreign state. There is nothing in the record which indicates that any of the Wisconsin state courts which resolved Respondent Wausau's PETITION TO COMPEL ARBITRATION ever performed such an analysis with regard to Banco, the foreign state.

It should be noted that both lower courts partially performed the FSIA jurisdictional analysis discussed above, in that they assured themselves that *they* actually had subject matter and personal jurisdiction over Banco. Both, however, declined to perform the same FSIA analysis to determine whether or not the Wisconsin state court(s) which resolved Respondent's PETITION TO COMPEL ARBITRATION had the requisite jurisdiction over Banco.

The Court of Appeals for the Seventh Circuit held that Banco had notice when its designated agent was served with the Petition to Compel Arbitration. It dismissed Banco's objections that service of the Petition failed to meet the FSIA's standards by stating that "Banco's attempts to shield itself beneath the procedural requirements of the FSIA merely obfuscate the real issue of notice." See App. A at 18a.

Thus, one must turn to how the other federal court decisions have treated the procedural requirements of the FSIA in order to determine whether Banco's "objections" have merit. In *Antoine* v. *Atlas Turner*, 66 F.3d 105, 109 (6th Cir. 1995), the court stated:

> We stated that the purpose of the FSIA is "to insure actual notice to foreign states of the fact and substance of pending litigation" and held that "[W]here a party has received such notice, despite technical omissions in the manner of service, the purpose of the Act if not its letter has been satisfied."

The holding it quoted and followed was set forth in *Sherer* v. *Construcciones Aeronautics, S.A.*, 987 F.2d 1246 (6th Cir. 1993), *cert. denied*, 510 U.S. 818, 114 S.Ct. 72 (1993). Before reaching said holding, the *Sherer* Court analyzed how

other courts had handled the issue of whether FSIA §1608 requires strict compliance with its service provisions, or whether substantial compliance with said provisions was sufficient to comply with the Act. It analyzed the following decisions, *Id.* at 1248 - 49:

*Harris Corp.* v. *National Iranian Radio and Television,* 691 F.2d 1344 (11th Cir. 1982), the Eleventh Circuit noted that the foreign state only challenged service on the grounds of noncompliance with the requirements set forth in the FSIA, but it did not deny that it had received notice of the action. It then went on to state, "[T]he failure to follow precisely those steps in §1608 designed to insure that actual service be made should not invalidate the fact that in this case notice was *actually received.*" [Emphasis supplied.] *Id.* at 1352.

*Velidor* v. *L/P/G Benghazi,* 653 F.2d 812 (3rd Cir. 1981), *cert. denied,* 455 U.S. 929, 102 S.Ct. 1297 (1982), the *Sherer* Court noted that the Third Circuit also held that actual notice was more important than strict compliance with technical requirements of the FSIA. It then stated the following, *Id.* at 1248:

> The court looked at the congressional intent in enacting §1608 of the FSIA and opined:
>
> Rather than making service on foreign instrumentalities a rigid, technical, or cumbersome procedure, Congress sought to facilitate the ability of private plaintiffs to serve foreign citizens. In addition, Congress wanted to insure that the sovereign owner would receive actual notice. H. R. Rep. No. 94-11487 at 23-24.

*Obenchain Corp.* v. *Corporation Nationale de Inversiones*, 656 F. Supp. 435 (W.D. Pa. 1987) aff'd in part and rev'd in part, 898 F.2d 142 (3rd Cir. 1990), "the court concluded that despite technical omissions with the FSIA requirements where service had resulted in actual notice, the purpose of the FSIA had been satisfied. *Id.* at 437."

*Gray* v. *Permanent Mission*, 443 F. Supp. 816 (S.D.N.Y.), aff'd. 580 F.2d 1044 (2nd Cir. 1978), the lower court held that "[t]he plaintiffs failure to comply with the explicit service requirements of the statute meant that the Congo Mission did not receive the requisite notice of the action against it." *Id.* at 820.

*Magnus Electronics* v. *Royal Bank*, 620 F. Supp. 387, 389 (N.D. Ill. 1983) aff'd in part, rev'd in part, 830 F.2d 1396 (7th Cir. 1987) the *Sherer* Court noted the following, "(Noncompliance with literal requirements of FSIA deprived court of jurisdiction, service defects could be cured, but subject matter jurisdiction was lacking)".

*Sherer* also discusses several district court cases, all to the same effect. One case it did not discuss, however, was the Seventh Circuit's *Alberti* v. *Empresa Nicaraguense De La Carne*, 705 F.2d 250 (7th Cir. 1983). In this decision the Seventh Circuit recognizes the following points regarding the FSIA, *Id.* at 252-53:

> The FSIA sets forth "the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." H. R. Rep. No. 1487, 94th Cong. 2d Sess., reprinted in 1976 U.S. Cong. & Ad. News, 6609, 6610 (hereinafter referred to as

House Report). FSIA starts from a premise of immunity from jurisdiction for foreign states and then provides several exceptions under which a foreign state may be subject to the jurisdiction of a court of the United States. 28 U.S.C. §1604. House Report at 6616. These exceptions, discussed hereunder, allow the court to obtain subject matter jurisdiction over the case and provide the minimum contacts with the United States required by due process before a court can acquire personal jurisdiction. House Report at 6612. Under FSIA subject matter jurisdiction coupled with proof of service of process establishes personal jurisdiction. 28 U.S.C. §1330(b). House Report at 6612.

* * * * *

*Section 1608 of the FSIA, which establishes a federal long-arm statute for suits against foreign states, delineates the 'exclusive procedures' for effecting service of process upon a foreign state.* [Emphasis added.]

Thus, on the basis of the foregoing it would appear that not only is the decision below in conflict with the congressional mandate, the decisions of the Supreme Court, the decisions of the Second, Third, Sixth and Eleventh Circuit Courts of Appeal, but it is also in conflict with prior decisions of the Seventh Circuit Court of Appeals itself. Surprisingly, the Seventh Circuit's opinion involved herein makes no attempt at distinguishing its holding from the decisions discussed above, including its own, and does not even refer to these cases nor to the FSIA's legislative history.

None of the forgoing is meant to suggest that Banco believes that it would have been able to assert sovereign immunity in this matter, had it received proper notice. But in order for Respondent Wausau to have properly brought Banco before the courts of Wisconsin, it had the obligation to serve Banco pursuant to the FSIA. This it did not do. Consequently, Banco was never provided with the requisite notice that Congress intended for foreign states to receive before they could be sued in the courts of the United States, and before these courts could properly assert subject matter jurisdiction and personal jurisdiction over said foreign state.

## ARGUMENT III

**Banco was never provided with "notice reasonably calculated" and was therefore denied a fundamental right of due process.**

The standard for notice set forth in *Mullane*, *Id.* at 314, was :

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.* [Emphasis supplied.]

This Court has cited the above standard with approval more recently in *Schroeder* v. *City of New York*, 371 U.S. 208, 83 S.Ct. 279 (1962), *National Equipment Rental, Ltd.* v. *Szukhent*, 373 U.S. 311, 84 S.Ct. 411 (1964) and *Phillips Petroleum Company v. Shutts*, 472 U. S. 797, 105 S.Ct. 2965

(1985). As seen above, the Court of Appeals held that "Banco's designation of an agent for process did not constitute a waiver of its right to notice reasonably calculated to allow it to be heard."

However, it then makes that finding meaningless when it then states, *Id.* at 944. App. A at 15a:

> Here, Banco's designation of registered agents for service of process created an agency relationship from which actual notice, rather than constructive notice, must be inferred. *See, Peterson* v. *Sealed Air Corp.*, 902 F.2d 1232, 1237 (7th Cir. 1990). Service upon a duly appointed agent comports with the due process clause. *See, Nat'l Equipment Rental, Ltd.* v. *Szukhent,* 375 U.S. 311, 317 (1964), *Kaplan* v. *United States*, 133 F.2d 469, 475 (7th Cir. 1964).

The Court of Appeals then goes on to read "notice reasonably calculated," *Id.* at 945. App. A at 16a:

> In the circumstance before us, Wausau was merely required to inform Banco, or one of its registered agents, of its motion to compel arbitration against the syndicate, or of its wish to conduct arbitration.

It is respectfully submitted that the Court of Appeals has thereby distorted the concept of "notice reasonably calculated" to such an extent as to render it meaningless and to render it unrecognizable by the *Mullane* Court. First and foremost is the fact that the Court of Appeals did find that Banco did not waive its right to the *Mullane* notice by

designating agents for service of process. It cannot then conclude that the agency itself provided the actual notice. The two holdings are internally inconsistent. It then cites the *Peterson, National Equipment Rental, Ltd.* and *Kaplan* decisions in support of its agency holding. As shall be seen, this reliance is misplaced as these decisions are readily distinguishable and do not support the Court's holding.

The *Peterson* case, a Seventh Circuit decision, is distinguishable factually because the registered agent for service *knew* when it was served with the summons and complaint that the corporate entity named as the party defendant was improperly named and was not the proper party defendant. It knew that a subsidiary, which was a corporate shell, had been named instead of the parent corporation. The registered agent accepted service on behalf of the parent corporation and immediately served it with copies of process. Thus, the registered agent knew on behalf of whom it was accepting service and the proper party defendant had *actual notice* of the pending litigation being brought against it. This is quite different from the situation involved herein.

Next the Court of Appeals seeks to rely upon this Court's *National Equipment Rental, Ltd.* decision, Ibid. However, in that opinion, this Court clearly limited its ruling by stating the following, *Id.*, at 315:

> We need not and do not in this case reach the situation where no personal notice has been given to the defendant. Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made. The case before us is therefore quite different from cases where

> there was no actual notice, such as *Schroeder* v. *City of New York*, 371 U. S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255, *Walker* v. *Hutchinson City*, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178, and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.2d 865.

It is respectfully submitted that Petitioner Banco falls squarely within the confines of the area the Supreme Court excluded from its ruling. It did not have "complete and timely notice" and it has raised a due process claim.

Lastly, the Court of Appeals relies upon its *Kaplan* decision, Ibid., but this is a peculiar choice at best. This case deals with several provisions of the Internal Revenue Code, 26 U.S.C. §§6221-33, and others, dealing with notice on partnerships and how small-share partners are to be deemed to have received "effective" notice. In this regard, the Court notes, *Id.* at 472:

> The Code construes notice to TMP [tax matters partner] as *constructive notice* to the small-share partners, the TMP is charged with notifying all of the small-share partners of any adjustments contained in the FPAA. Seed., §6223(g). [Emphasis supplied.]

And, later it notes that, *Id.* at 472, "This 'effective' notice, however, did not translate into *actual notice* to the Kaplans." [emphasis supplied.] Because of the above and the fact that this case deals with specific I.R.C. notice provisions concerning "effective notice" on partnerships, it is submitted that this case fails to offer any guidance with regard to the issues present in the case at bar. Consequently, the case law

the Court of Appeals cites in support of its agency holding quite simply fails to sustain its position.

The Court then goes on to state, as noted above, that "Wausau was merely required to inform Banco, or its registered agents, of its motion to compel arbitration against the syndicate, or of its wish to conduct arbitration." This indicates the Court's confusion with the facts involved in this case.[5] Banco was never part of any of the Lloyd's syndicates, had it been, it would have had full representation from LBB, Lloyd's counsel, at all stages of this controversy. Merely notifying the designated agents of Respondent's wish to compel the syndicates to arbitrate or of its wish to arbitrate, would fail to provide Petitioner Banco with "notice reasonably calculated."

Interestingly, the Court of Appeals seems to imply that if there were errors made with regard to the notice (served on the designated agents) failing to properly identify Petitioner Banco, then the blame should rest with the designated agents themselves, App. A at 16a-17a. It should be recalled that the District Court made its determination solely on the papers submitted to it. It decided that there was no necessity for a fact finding hearing. Thus, the discussion about the designated agents' indexing the Appendix, is purely the Court of Appeals own creation, as there is nothing in the record which suggests anything relating to same.

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[5] See, for example, the first two sentences of the Opinion below (APP. A at 1a) where the Court of Appeals erroneously identifies Banco as a member of the Lloyd's syndicate and makes the total award an award against the syndicate and identifies Banco's share as being a part of the total syndicate award. Unfortunately, these conceptual errors pervade the entire Opinion.

The most perplexing part of the Court of Appeals decision however is where it states the following, *Id.* at 946. App. A at 18a:

> Banco's attempts to shield itself beneath the procedural requirements of the FSIA merely obfuscate the real issue of notice. Banco seems to believe that any improprieties in Wausau's service of the motion to compel arbitration relieve Banco of notice of the arbitration. Instead, such an impropriety would render Banco immune to the action compelling parties to arbitrate. Wausau admittedly did not serve Banco with a summons, so might not have been able to compel Banco into arbitration.
>
> Other retrocessionaires were compelled to enter arbitration with Wausau, and arbitration occurred. By agreeing to the arbitration provision in the Treaty, Banco agreed to submit itself to the decision made by any arbitrators empanelled pursuant to the arbitration clause. Banco is bound to the arbitral award not by the motion to compel arbitration, but by the language of the Treaty that it made with Wausau.

The first sentence of the above quoted language is nothing less than shocking. For any court, let alone a United States Court of Appeals, to claim that a foreign state's attempts to assert its rights accorded to it by Congress constitute an obfuscation of the issues, is to wholly ignore the real issue of notice. One simply cannot determine whether a foreign state has been properly sued in an American court

without seeing if the plaintiff or petitioner has complied with the provisions of the FSIA. To accuse Banco of obfuscating the real issue of notice is disingenuous at best. Reviewing this reasoning under the *Mullane* standards reveals the following: these standards established that, *Id.* at 314: "notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The way the Court of Appeals now reads these standards, they mean that although the notice provided to Banco (and its designated agents) was not sufficient to bring it before the state court and litigate the issue presented in the Petition (compelling arbitration), it nevertheless was sufficient to provide it with notice of the underlying arbitration. If this reading is correct, then *Mullane* has no real meaning any more.

However, the *Mullane* standards do not operate in a vacuum. In the instant case they must be read in conjunction with the FSIA, because Petitioner Banco is, after all, a foreign state. As discussed fully above, the FSIA provides the exclusive means of suing a foreign state in the courts of the United States. The FSIA, and the case law construing it, have made it a prerequisite to a foreign state being amenable to suit in this country, that said foreign state be given actual notice of the pendancy of the suit. Consequently, to accept that Respondent Wausau's service of process herein was insufficient to bring Banco before the state court that was ultimately to determine the Petition to Compel Arbitration, but was sufficient to give it the requisite notice of the underlying arbitration, would be to reduce the FSIA's actual notice requirements to absurdity. Under either test, the service was insufficient to put Banco on notice of the pendancy of the court action or of its underlying arbitration.

While the Court of Appeals fails to cite any authority to support these two paragraphs, it nevertheless overlooks the obvious: "Other retrocessionaires were compelled to enter arbitration with Wausau, and arbitration occurred." The parties arbitrated as a direct result of the order entered compelling them to arbitrate. Thus, if the court entering this order lacked subject matter jurisdiction and personal jurisdiction over Banco, the order it entered could not confer same upon the arbitration panel. Consequently, any order entered by the panel could not bind Banco because the panel also lacked jurisdiction over Banco.

Not only did Banco not participate in the arbitration for lack of knowledge, and notice, but neither the Court nor the Arbitration panel acquired jurisdiction over Banco.

## CONCLUSION

The Court of Appeals decision in the case is inconsistent with long standing Supreme Court and Circuit Court decisions relating to the Foreign Sovereign Immunities Act and due process requirements of "notice reasonably calculated." The Petition for Writ of Certiorari should be granted. Otherwise, foreign states will face the perils of having to satisfy what are, in effect, default judgments obtained against them in our courts, where neither the spirit nor the letter of the law have been met.

/s/_____
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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed December 15, 1999]

No. 99-1304

EMPLOYERS INSURANCE OF WAUSAU,
*Plaintiff-Appellee*,

v.

BANCO DE SEGUROS DEL ESTADO,
*Defendant-Appellant*.

## OPINION

Before: POSNER, Chief Judge, and CUDAHY and KANNE, Circuit Judges.

KANNE, Circuit Judge.

Banco De Seguros Del Estado ("Banco") was a member of a Lloyd's, London syndicate that reinsured several insurance policies underwritten by Employers Insurance of Wausau ("Wausau"), a Wisconsin insurance company. In September 1995, an arbitration panel awarded Wausau

$7,783,324 from the syndicate, of which Banco was liable for $181,319. When Wausau filed a petition in the district court to confirm the arbitration award against Banco, Banco moved to vacate, claiming that Wausau's service of notice of arbitration did not comply with the terms of their reinsurance contract or with the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611. The district court granted Wausau's motion to confirm and denied Banco's motion to vacate. Banco appeals, claiming that the district court made errors of law and fact in determining that notice of arbitration had been served properly on Banco. Finding no error, we affirm.

## I. HISTORY

Banco is the state insurance bank and an instrumentality of the Sovereign Republic of Uruguay. Wausau is a mutual insurance company organized under Wisconsin law with its principal place of business in Wausau, Wisconsin. Between 1966 and 1973, Wausau entered into a series of contracts known as excess retrocessional insurance treaties ("Treaties") with more than 100 underwriters at Lloyd's, London and other London market insurance companies, including Banco, commonly referred to as the "retrocessionaires." Under the Treaties, the retrocessionaires agreed to reinsure Wausau for specified percentages of direct reinsurance losses paid by Wausau, as long as those losses were within the coverage of the Treaties.

The Treaties were identical to one another, except for the specific percentages of coverage allocated to a particular party under each one. Each Treaty contained an arbitration clause, which stated that any arbitration requested by the

parties would take place in Wausau, Wisconsin. The arbitration clause did not specify what procedures would be used in the event of an arbitration. Each Treaty also contained a "Service of Suit" clause, which provided that:

> It is agreed that in the event of a failure of the [retrocessionaires] hereon to pay any amount claimed to be due hereunder, [retrocessionaire], at the request of the reinsured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction. . .
>
> It is further agreed that service of process in such suit may be made upon Messrs. Mendes & Mount . . . and that in any suit instituted against [retrocessionaires], [retrocessionaires] will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.
>
> [Mendes & Mount] are authorized and directed to accept service of process on behalf of [retrocessionaires] in any such suit and/or upon the request of the reinsured to give a written undertaking to the reinsured that they will enter a general appearance upon [retrocessionaire's] behalf in the event such suit will be instituted.
>
> Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, [retrocessionaires] hereby designate the Superintendent, Commissioner or Director of Insurance or

> other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the reinsured . . . and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

The New York law firm of Mendes & Mount was designated as the party to accept service for Banco. Each Treaty also contained an "intermediary clause," which designated Pritchard & Baird, Inc., ("Pritchard") as the "intermediary . . . through whom all communications and transactions relating thereto shall be transmitted by the parties."

Pursuant to the intermediary clause, Wausau and the retrocessionaires originally communicated through Pritchard. However, Pritchard became insolvent in 1975, and the parties to the Treaties thereafter used Leslie & Godwin, a British firm, as an intermediary. The parties never amended their Treaty to reflect this change. Leslie & Godwin contacted Banco through another intermediary, Argenhall, S.A., an Argentine brokerage firm.

In 1984, Wausau began to submit proofs of loss to Leslie & Godwin and to Lord, Bissell & Brook, counsel to the lead underwriter among the retrocessionaires, Merrett Syndicate. These proofs of loss showed that policy-holders on policies reinsured by Wausau suffered extensive injuries related to asbestos contamination. Merrett Syndicate engaged

Lord, Bissell & Brook to audit these claims and determine whether they fell within the scope of the Treaties. Despite continued submissions of proofs of loss, the retrocessionaires refused to reimburse Wausau for its losses.

By 1991, Wausau determined that the retrocessionaires had not complied with the terms of the Treaties. On May 27, 1991, Wausau sent a demand for arbitration to Lord, Bissell & Brook, as agent for Merrett Syndicate, according to the custom of Lloyd's, London that the lead underwriter traditionally handles claims on behalf of all underwriters in a syndicate. Lord, Bissell & Brook then forwarded Wausau's arbitration demand to Leslie & Godwin, who attempted to notify the other retrocessionaires. In June 1991, Leslie & Godwin sent Argenhall a letter informing Banco of Wausau's arbitration demand and asking for confirmation that Lord, Bissell & Brook would represent them. Banco claims that it never received this communication. In the letter, Leslie & Godwin requested that Banco respond, but Banco did not.

On August 19, 1991, Wausau petitioned the Marathon County Circuit Court in Wisconsin for an order compelling the retrocessionaires to proceed with arbitration. The Wisconsin Commissioner of Insurance was served with two copies of the petition, and Mendes & Mount was served with one copy. In addition, Wausau provided Leslie & Godwin and Lord, Bissell & Brook each with a copy of the petition. The caption of the petition identified the respondents to the petition as including "certain London Market Insurance Companies, including those identified in Appendix A." Appendix A to the petition lists among the respondents the following two parties: "Banco" and "Banco di Seguros del

Estado." Banco claims that Mendes & Mount did not notify it of the petition.

The trial court granted Wausau's motion in October 1991, and the Wisconsin Court of Appeals affirmed the circuit court's decision in *Employers Ins. of Wausau v. Jackson*, 178 Wis. 2d 755, 505 N.W.2d 147 (Wis. Ct. App. 1993). In February 1995, the Wisconsin Supreme Court also affirmed. *See Employers Ins. of Wausau v. Jackson*, 190 Wis.2d 597, 527 N.W.2d 681 (Wis. 1995). The arbitration proceedings commenced in the summer of 1995. In August 1995, Leslie & Godwin again contacted Argenhall and attempted to inform Banco that it was a party in the arbitration proceeding and to ask Banco if it wished Lord, Bissell & Brook to represent it in the proceedings. Banco did not respond to this message and did not participate in the proceedings.

On September 18, 1995, the arbitration panel issued an award in favor of Wausau in the amount of $7,783,324 as a full and final settlement of all its loss claims. The retrocessionaires were each liable for a portion of the award, which varied according to each retrocessionaire's proportionate share of the coverage allocation. The retrocessionaires were given forty-five days to pay their respective shares. If they did not pay, each would be subject to stiff penalties, including 7.5 percent interest and joint and several liability for attorneys' fees and costs, and would be required to provide a $9,000,000 letter of credit to Wausau to secure payment of the retrocessionaires' ultimate liability. Banco's share of the total award was $181,319, but Banco was not listed on the arbitration award. Banco claims that it was never informed of the arbitration proceedings, and it has

not paid either its share of the award or its additional penalties, which now exceed $9,000,000.

In July 1998, Wausau filed a petition to confirm the arbitration award as to Banco in the United States District Court for the Western District of Wisconsin. Wausau served this petition on both the Wisconsin Commissioner of Insurance and on Mendes & Mount. Banco's name was listed in the caption, and Mendes & Mount caused process to be served on Banco at its principal place of business in Montevideo, Uruguay. Banco responded to the motion with a motion to vacate the arbitration panel's award. It claimed that it had never received notice of the arbitration and was not properly served in accordance with Wisconsin law or the requirements of the FSIA. On January 5, 1999, the district court denied Banco's motion to vacate and granted Wausau's motion to confirm. The court found that service on Mendes & Mount and the Wisconsin Commissioner of Insurance of the petition to compel arbitration was sufficient to meet the requirements of the Treaties, Wisconsin law and the constitutional right to due process.

## II. ANALYSIS

On appeal, Banco argues that the district court erred by determining that Wausau's service of process was effective as to Banco, and it argues that the court made clearly erroneous findings of fact in granting Wausau's motion to confirm its arbitration award. In reviewing the grant of a motion to confirm an arbitration award, we decide questions of law de novo and review findings of fact for clear error. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938,

947-48, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Geneva Secs., Inc. v. Johnson*, 138 F.3d 688, 691 (7th Cir. 1998).

As an instrumentality of the sovereign state of Uruguay, Banco is a "foreign state" within the meaning of §§ 1603(a)-(o) of the FSIA. *See* § 1603(a) ("A 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)."); § 1603(b)(1)-(3) (defining "instrumentality" as "a separate legal person, corporate or otherwise . . . which is an organ of a foreign state . . . or a majority of whose shares or other ownership interest is owned by a foreign state . . . which is neither a citizen of a State of the United States . . . nor created under the laws of any third country"). Foreign states possess immunity from the jurisdiction of courts of the United States, except as specified by the FSIA. *See* §§ 1604-1607. By agreeing to a Treaty which designated Wausau, Wisconsin, as the site of any arbitration, however, Banco has waived its immunity in any proceeding to confirm the arbitral award. *See* § 1605(a)(6)(A). Federal courts have original subject matter jurisdiction over all suits involving foreign states, *see* § 1330(a), and Banco admits that Wausau's motion to confirm satisfied the FSIA service requirements, so there is also personal jurisdiction over Banco in this matter. *See* §§ 1330(b), 1608(b)(1).

Because the United States and Uruguay are both signatories, the Inter-American Convention on International Commercial Arbitration ("Inter-American Convention") Article V(1)(b), Jan. 30, 1975, reprinted at 9 U.S.C. § 301, governs the procedure of confirming an arbitral award as well

as the procedure of refusal for an award.[1] Section 302 of the Inter-American Convention incorporates certain sections of the New York Convention, codified at 9 U.S.C. §§ 201-208, into arbitration proceedings where both parties are citizens of signatory states. *See* 9 U.S.C. § 302 (incorporating 9 U.S.C. §§ *202-205,* 207); *see also Jain v. de Mere*, 51 F.3d 686, 689 (7th Cir. 1995) ("[A]ny commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the [New York] Convention.").

Under the New York Convention, within three years of any arbitral award any party to the arbitration may apply to any court with jurisdiction for an order confirming the award against any other party to the arbitration. *See* 9 U.S.C. § 207; *Generica Ltd. v. Pharmaceutical Basics, Inc.*, 125

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[1] As the district court noted, since both the United States and Uruguay are also signatories of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), Dec. 29, 1970, reprinted at 9 U.S.C.A. § 201, codified at 9 U.S.C. §§ 201-208, unless a majority of the other retrocessionaires are also signatories of the Inter-American Convention, the New York Convention would actually apply to this dispute. *See* 9 U.S.C. § 305. However, as we discuss below, the provisions of both conventions are interpreted to reach the same result in each case, and, lacking knowledge of the signatory status of the home states of the remaining retrocessionaires, the parties have stipulated that the Inter-American Convention shall apply. Since the outcome would not be affected if we instead applied the New York Convention, we agree with the district court that "the point appears to be technical."

F.3d 1123, 1129 (7th Cir. 1997). That court shall confirm the award "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in [the Inter-American] Convention." 9 U.S.C § 207 (as applied in 9 U.S.C. § 302 to the Inter-American Convention). Article V of the Inter-American Convention specifies seven grounds for refusal of recognition, among them that a party "was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed or was unable, for any other reason, to present his case. . . ." Inter-American Convention, Article V(I )(b).

Although arbitration "is simply a matter of contract between the parties," *First Options*, 514 U.S. at 943, 115 S.Ct. 1920, and the parties to a contract can choose to modify the technical requirements for notice of arbitration in the same way that they can modify any other arbitration procedure, there is no evidence in the Treaties between Banco and Wausau of any special notification procedure to be followed in the event of an arbitration. Absent any agreement to the contrary, Article V(1)(b) grants a party the due process rights of the forum state, in this case those of Wisconsin and the United States. *See Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969,975-76 (2d Cir. 1974) (interpreting analogous Article V(1)(b) of New York Convention). *See also Productos Mercantiles E Industriales, S.A.v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994) (stating that Inter-American Convention is "intended . . . to reach the same results as those reached under the New York Convention"). The right to adequate notice is one part of a fundamentally fair hearing. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 LEd. 865 (1950) ("An elementary

and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). However, like all other due process fights, the right to notice may be waived prior to attachment. *See D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972). Accordingly, if Banco did not waive its right to notice and was not provided with notice reasonably calculated under the circumstances of arbitration, we may refuse to enforce the award pursuant to Article V(1)(b).

**A. Waiver**

The Treaties between Banco and Wausau contain a "Service of Suit" clause which designates that, in any suit filed to recover any amount of money due under the Treaties, Mendes & Mount and the Wisconsin Commissioner of Insurance may be served as Banco's agents for service of process. Wausau argues that by designating special agents for the service of process Banco has waived its right to notice reasonably calculated to apprise it of the pending arbitration.

For an American court to assert personal jurisdiction over a foreign defendant, the court must generally determine that the company has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *see also Koster v. Automark Indus.*, 640 F.2d 77, 78 (7th Cir. 1981 ). However, by agreeing to designate an agent for service of process, as Banco has, foreign companies can waive this requirement of "minimum

contacts." *See RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1280 (7th Cir. 1997) (holding that, because personal jurisdiction is waivable, parties can contract around minimum contacts requirement). Personal jurisdiction in a given dispute is conditioned on both a court's ability to assert jurisdiction over a defendant and a defendant's receipt of notice and opportunity to be heard. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (distinguishing right to notice from right to personal jurisdiction); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). By designating a local agent to serve process, Banco knowingly waived its right to dispute personal jurisdiction. There is no evidence that Banco knowingly waived its right to "notice reasonably calculated." Without knowledge, we are loath to determine that a party has waived its due process rights. *See, e.g., Sethness-Greenleaf, Inc. v. Green River Corp.*, 65 F.3d 64, 67 (7th Cir. 1995) ("[W]aiver in contract law is the intentional relinquishment of a known right"). We find that Banco's designation of an agent for service of process did not constitute a waiver of its right to notice reasonably calculated to allow it to be heard.

**B. Notice Reasonably Calculated**

Banco admits that a copy of the motion to compel arbitration was served by a proper person on its designated agents. It argues that the motion itself was insufficient to provide notice to either Banco or its agents that Banco was a party to the arbitration. Banco relies on three contentions to assert that Wausau's motion is insufficient to provide notice reasonably calculated to Banco or its agents: (1) Wausau did not follow proper Wisconsin procedures in its service of process on Banco's agents; (2) Wausau failed to follow the

special service of process procedure required by the FSIA for foreign sovereigns; (3) even if Wausau followed the proper Wisconsin procedures, these procedures do not provide "notice reasonably calculated" as required by the United States Constitution and the Wisconsin Constitution.

Banco contends that Wausau failed to meet Wisconsin's notice requirement because it failed to list Banco in the caption of its motion to compel arbitration and it failed to serve a formal summons with its motion on Banco's agents. Banco argues that the parties did not specify by contract the rules under which arbitration would be conducted. Therefore, because Article V(1)(b) requires that, absent a waiver, arbitration proceedings must meet the due process rights of the forum state, *see Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145-46 (2d Cir. 1992), Wausau needed to meet both the notice requirements and the statutory service requirements of the forum state.

We disagree with Banco's contention that Article V(1)(b) of the Inter-American Convention requires that service of process be made in accordance with the forum state's service of process statute. Service of process according to statute raises a presumption that due process has been met. *See Mid-America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1358-59 (7th Cir. 1996) (Wisconsin Constitution grants personal jurisdiction whenever state long-arm statute has been met, as long as statute meets due process requirements of federal Constitution); *Federated Rural Elec. Ins. Corp. v. Inland Power & Light Co.*, 18 F.3d 389, 391 (7th Cir. 1994). However, Article V(1)(b) only provides Banco with the protection of due process, and due process does not require Wausau to meet state statutory

requirements for service of process. *See Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) ("[A] violation of state law . . . is not a denial of due process, even if the state law confers a procedural right."). It only requires that Wausau provide Banco with "notice reasonably calculated" under the federal due process standard. *See generally Waterspring, S.A. v. Trans Marketing Houston Inc.*, 717 F.Supp. 181, 186 (S.D.N.Y. 1989) ("An agreement to arbitrate in New York constitutes a consent to submit to the personal jurisdiction of the courts of New York, and such consent 'includes consent to service by any method consistent with due process.'"); *Lawn v. Franklin*, 328 F.Supp. 791, 794 (S.D.N.Y. 1971) ("Where there is advance consent to the jurisdiction by contract the service of process may be made by any method consistent with due process."). Thus two of Banco's arguments may be merged into one; that by failing to name it in the caption of its motion and providing Mendes & Mount with only one copy of the motion, Wausau failed to provide Banco with "notice reasonably calculated." Both the United States and Wisconsin adhere to the standard of "notice reasonably calculated" enunciated in *Mullane*. *See Greene v. Lindsey*, 456 U.S. 444, 449-50, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982); *Dillon v. Dillon*, 46 Wis.2d 659, 176 N.W.2d 362, 365-66 (Wis. 1970) (adopting *Mullane* notice standard, along with compliance with state long-arm statute, as the due process requirement for Wisconsin Constitution).

Under Wisconsin law, a principal is "bound and affected by such knowledge and notice as its agents received." *Lakeshore Commercial Fin. Corp. v. Bradford Arms Corp.*, 45 Wis.2d 313, 173 N.W.2d 165, 172 (Wis. 1970). *See generally Smith v. Metropolitan Life Ins.*, 94 F.2d 277, 280 (7th Cir. 1938) (finding notice to a designated agent binding

on party). Here, Banco's designation of registered agents for service of process created an agency relationship from which actual notice, rather than constructive notice, must be inferred. *See Peterson v. Sealed Air Corp.*, 902 F.2d 1232, 1237 (7th Cir. 1990). Service upon a duly appointed agent comports with the due process clause. *See Nat'l Equipment Rental, Ltd. v. Szukhent,* 375 U.S. 311,317-18, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964); *Kaplan v. United States*, 133 F.3d 469, 475 (7th Cir. 1998). In *Kaplan*, we found that providing notice to a designated "notice partner" in a limited partnership satisfied the due process notice requirement for other limited partners who were not personally given notice. Appellants argued that certain provisions of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), 26 U.S.C. §§ 6621-34, were unconstitutional because it denied due process to certain partners with a *de minimis* stake in the partnership personal notice of an adjustment to a limited partnership's taxes. In finding that notice to some partners imputed notice upon all members of the partnership, we noted the "common-law principle of partnership law that notice to one general partner constitutes notice to all partners." *Kaplan*, 133 F.3d at 475. That common-law principle depends on the characterization of a partnership as a web of interlocking agency relationships, in which each principal is imputed actual knowledge from the knowledge of any of his agents. We find the principle set forth in *Kaplan* applicable to the facts before us. Thus, if either Mendes & Mount or the Wisconsin Commissioner of Insurance received actual notice that Banco was subject to the Wausau arbitration, then Banco received notice sufficient to meet the requirements of due process.

Banco rests its contention that Wausau did not serve its agents with adequate notice that Banco was a party on two facts: (1) the motion to compel arbitration fails to list Banco correctly in either the official caption or Appendix A; (2) each agent was provided with only one copy of process, despite the large number of retrocessionaires. Banco argues that Wausau instead should have sent a copy of process to Banco's (and every other retrocessionaire's) principal place of business. However, "notice reasonably calculated" requires only that the notice provided "be of such nature as reasonably to convey the required information." *Mullane*, 339 U.S. at 314, 70 S.Ct. 652. In the circumstances before us, Wausau was merely required to inform Banco, or one of its registered agents, of its motion to compel arbitration against the syndicate, or of its wish to conduct arbitration.

No reasonable person could be expected to serve more than 100 copies (that is, one copy for each retrocessionaire) of the same motion on Mendes & Mount and the Commissioner of Insurance. As the district court noted, the purpose of the Service of Suit clause is, in part, to anticipate the burden of personally serving the numerous members of each Lloyd's syndicate individually and avoid it by designating a uniform agent for all. Moreover, knowing that the same person would be agent to each of the retrocessionaires, no reasonable person would expect each retrocessionaire to be listed in the caption. If the agent must index the Appendix to find the names of some retrocessionaires, it would not be unreasonable to expect the agent to do so for all of them. Had Wausau not erroneously listed Banco in the Appendix as either "Banco" or "Banco di Seguros del Estado," there would be no reason to question that it provided Banco's agents with "notice reasonably

calculated" to apprise them of Banco's involvement in the pending arbitration.

Wausau misspelled Banco's name in the Appendix, so we must consider whether this error is one of sufficient magnitude to compromise Wausau's attempt to provide Banco with notice. We will not allow a technical error such as a spelling mistake to implicate Banco's right to due process, because both Mendes & Mount and the Wisconsin Commissioner of Insurance had the duty as agents of Banco to make a reasonable inquiry into who "Banco di Seguros del Estado" might be. *See, e.g., Dombeck v. Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 24 Wis.2d 420, 129 NW.2d 185, 194 (Wis. 1964) ("The general rule is that a principal may recover from his agent for loss or damage caused the principal by the negligent act of the agent."). The burden of deciphering the technical error in its principal's name in this case should rest on Banco's agents: the Wisconsin Commissioner of Insurance and Mendes & Mount. Thus, we agree with the district court that Wausau's service of its motion on both Mendes & Mount and the Wisconsin Commissioner of Insurance provided Banco with "notice reasonably calculated" of the pending arbitration.

In the alternative, Banco argues that, as the instrumentality of a foreign sovereign, it has general immunity from suit in the United States, subject only to the exceptions of the FSIA. Pursuant to the FSIA, certain formalities must be followed in the proper service of a complaint. Section 1608 of the FSIA requires that service be made "(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or

instrumentality. . . ." or "(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents." *Id.* at § 1608(b)(1)-(2).

Banco contends that the only clause in the treaty that could constitute a "special arrangement" for the purposes of the act was the intermediary clause, but neither it nor the procedures of any applicable international convention were followed. In addition, Banco notes that Wausau never served the summons required in both § 1608(b)(1) and § 1608(b)(2). Therefore, Banco contends that it was never properly served with notice of the pending arbitration.

Banco's attempts to shield itself beneath the procedural requirements of the FSIA merely obfuscate the real issue of notice. Banco seems to believe that any improprieties in Wausau's service of the motion to compel arbitration relieve Banco of notice of the arbitration. Instead, such an impropriety would render Banco immune to the action compelling parties to arbitrate. Wausau admittedly did not serve Banco with a summons, so might not have been able to compel Banco into arbitration.

Other retrocessionaires were compelled to enter arbitration with Wausau, and arbitration occurred. By agreeing to the arbitration provision in its Treaty, Banco agreed to submit itself to the decision made by any arbitrators empaneled pursuant to the arbitration clause. Banco is bound to the arbitral award not by the motion to compel arbitration, but by the language of the Treaty that it made with Wausau.

Banco, of course, could have retained immunity from any proceedings to confirm the award had Wausau not served notice of the motion to confirm an arbitration award. However, Wausau properly served notice of the motion to confirm, and we must confirm the award regardless whether Banco could have been forced to participate in the arbitration. *See* 9 U.S.C. § 207 ("The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [Inter-American] Convention." (emphasis added)). We have already determined that Banco had notice as required by Article V(1)(b) of the Inter-American Convention, and any fault in Banco's inability to appear at the arbitration rests with Banco's designated agents, not with Wausau. Absent any grounds for refusal of recognition of the award, we are compelled by the Inter-American Convention to confirm it.

Banco also obfuscates the issue of notice by claiming that the arbitration award was, in effect, a default judgment, so the requirements of § 1608(e) of the FSIA must be met. Section 1608 requires that any claimant of a default judgment establish his right to relief "by evidence satisfactory to the court." § 1608(e). However, § 1608(e), like the rest of the FSIA refers to judicial proceedings. Wausau never sought a default judgment against Banco; instead it seeks to confirm an arbitral award in the manner provided by the FSIA. Section 1608(e) does not apply.

### C. Findings of Fact

Banco also argues that the district court made clearly erroneous findings of fact which led it incorrectly to grant Wausau's motion to confirm. Banco disputes three

"undisputed facts" found by the district court: (1) Wausau notified all retrocessionaires of its filing of suit by service on Mendes & Mount; (2) a custom exists at Lloyd's, London that the petitioner need only inform the lead retrocessionaire of matters relating to the operation of the Treaties; (3) Leslie & Godwin had not communicated directly with Banco, but instead sent information in care of Argenhall. We review findings of fact made in motions to confirm arbitration for clear error, *see First Options*, 514 U.S. at 947-48, 115 S.Ct. 1920, and will reverse the trial court only if we come to a "definite and firm conviction" that it made a mistake. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).

We are unconvinced that any of the district court's findings of undisputed fact are clearly in error. Banco contends that, because it disputes receiving notice of the arbitration after Wausau served Mendes & Mount, all the retrocessionaires did not receive notice of the pending arbitration. We have found that each retrocessionaire listed in the caption of the motion to compel arbitration must be imputed to have received actual notice by service on Mendes & Mount. Because Banco does not provide us with evidence that any other retrocessionaire was omitted from the motion to compel arbitration, we see no error in the district court's finding.

In holding that Banco received notice of arbitration by Wausau's service of the motion to compel, we do not rely on any of the other findings of fact that Banco urges us to review. As such, these findings do not prejudice Banco, and

"[a]n error that is not prejudicial is still an error, but it is unlikely to be a clear error." *Chaulk v. Volkswagen of America, Inc.*, 808 F.2d 639, 644 (7th Cir. 1986) (Posner, J., dissenting). After our review of the facts, we find that Banco presented the district court with no evidence to controvert either of the other undisputed facts that it asserts were found erroneously. Absent any evidence that would tend to contradict such findings, we find no clear error in the other findings of fact made by the district court.

## III. CONCLUSION

Because we find that Wausau's motion to compel arbitration effectively gave Banco notice of arbitration proceedings and because we find that the district court made no clearly erroneous findings of fact in confirming the arbitration award in favor of Wausau or in denying Banco's motion to vacate the arbitration award, the decisions of the district court are AFFIRMED.

## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed January 5, 1999]

No. 98-C-0521-C

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY,
*Petitioner*,

v.

BANCO SEGUROS DEL ESTADO,
*Respondent*.

## OPINION AND ORDER

This case involves a dispute over reinsurance "treaties" petitioner Employers Insurance of Wausau acquired at Lloyd's of London. The treaties obligated the underwriters (or Retrocessionaires) to reimburse petitioner for certain types of claims made upon it. The Retrocessionaires denied that they were bound under the treaties to reimburse petitioner for certain asbestos-related losses. To settle the dispute, petitioner invoked the treaties' arbitration clause. It won, obtaining an award against the Retrocessionaires for more

than $7,000,000 together with nearly $1,000,000 in attorney fees.

Presently, petitioner has moved to confirm the award against respondent Banco Seguros Del Estado (the state bank of the Republic of Uruguay), pursuant to the Inter-American Convention on International Commercial Arbitration, reprinted in 9 U.S.C.A § 301 (West Supp. 1998). In a cross motion, respondent moves to vacate the award, contending that the award is invalid because petitioner did not give proper notice of the arbitration. Respondent argues that, as a foreign state, it should have received notice consistent with the requirements of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611. Alternatively, it argues that the method petitioner relied on to deliver notice was inconsistent with due process standards of the forum state of the arbitration, the state of Wisconsin.

In an order entered November 4, 1998, I advised the parties that respondent's motion to vacate would be decided on the briefs flied as of that date and that further briefing on petitioner's motion to confirm would be ordered if necessary. It is not: both motions may be decided now.

Briefly, I conclude that because petitioner gave notice of its invocation of the arbitration clause in a manner consistent with the terms of the treaties and the business custom of Lloyd's of London, respondent received adequate notice as guaranteed by the Inter-American Convention and due process. Respondent's motion to vacate will be denied. Separately, I find no basis to respondent's contention that the award cannot be confirmed as a matter of equity. There being

no valid objection to the award, petitioner's motion to confirm will be granted.

The facts are taken from three sources: the allegations of petitioner's petition to confirm the arbitration award, respondent's answer to the petition, and the affidavits and exhibits the parties filed in support of their cross-motions. These materials are properly considered without an evidentiary hearing. The Inter-American Convention incorporates non-conflicting components of the Federal Arbitration Act, 9 U.S.C. §§ 1-16. See 9 U.S.C. §§ 208,305. One such non-conflicting component is § 6, which provides that applications concerning arbitration awards "shall be made and heard in the manner provided by law for the making and hearing of motions." This section affords courts discretion to devise their own procedures for deciding arbitration-related motions, including the power to decide motions related to arbitral awards without a hearing. See Legion Insurance Co. v. Insurance General Agency, Inc., 822 F.2d 541,541-43 (5th Cir. 1987) (district court properly declined to consider evidence beyond that presented in documents filed to support and oppose motion to confirm arbitration award); see also Imperial Ethiopian Government v.Baruch-Foster Corp., 535 F.2d 334, 337 n. 10 (5th Cir. 1976) (district court not required to hold evidentiary hearing in order to decide issue under Convention on the Recognition and Enforcement of Foreign Arbitral Awards, reprinted in § 9 U.S.C.A. § 201 (West Supp. 1998)).

I find that the following facts are undisputed.

## UNDISPUTED FACTS

Petitioner Employers Insurance of Wausau is a mutual insurance company organized under the laws of the state of Wisconsin with its principal place of business in Wausau, Wisconsin. Respondent Banco de Seguros del Estado is the state insurance bank of the Republic of Uruguay. During all relevant times, its principal place of business has been Montevideo, Uruguay.

Between 1966 and 1973, petitioner entered into a series of excess retrocessional insurance "treaties" with underwriters, (or Retrocessionaires), at Lloyd's of London. In effect, the subject treaties obligated the Retrocessionaires to pay petitioner specified percentages of losses incurred by petitioner that were within the coverage of the treaties.

The Retrocessionaires are a group comprising more than one hundred individuals and firms, including respondent. When there are many underwriters to a policy sold at Lloyd's market, it is customary that the underwriter accepting the greatest portion of the risk is designated the lead underwriter and it assumes responsibility for servicing claims on behalf of all the underwriters. With respect to the subject treaties, the Merrett Syndicate is the lead Retrocessionaire.

Two London firms brokered the placement of the treaties, Pritchard & Baird, Inc., and Leslie & Godwin, Ltd. Although only Pritchard & Baird is designated in the treaties as the "intermediary" through whom "all communications and transactions" are to be transmitted by the parties, in practice, when Pritchard & Baird received a communication from petitioner, it forwarded the communication to Leslie &

Godwin, which would actually notify the Retrocessionaires. Hence, in 1977, when Pritchard & Baird became insolvent, Leslie & Godwin simply began to relay information directly between petitioner and the Retrocessionaires. However, the treaties were not amended to name Leslie & Godwin as the formal intermediary.

Textually, the various treaties written for the period 1966 to 1973 are identical except for changes in allocations of loss percentages. Each of the treaties contains an arbitration clause which provides:

> If any dispute or difference of opinion shall arise with reference to the interpretation of this Agreement of the rights with respect to any transaction involved, the dispute shall be referred to three arbitrators, who shall be executive officers of insurance companies domiciled in the U.S.A., one to be chosen by [petitioner], one to be chosen by the Retrocessionaire[s], and the third by the two arbitrators so chosen within 30 days of their appointment.
>
> * * *
>
> The decision of a majority of the arbitrators shall be final and binding on both parties. The expense of the arbitrators and of the arbitration shall be equally divided between each party. Any such arbitration shall be equally divided between each party. Any such arbitration shall

> take place in Wausau, Wisconsin, unless some other location is mutually agreed upon.

Also, the treaties contain a "Service of Suit Clause," which provides, in part:

> It is agreed that in the event of the failure of [the Retrocessionaires] to pay any amount claimed to be due hereunder, [the Retrocessionaires], at the request of [petitioner], will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court
>
> It is further agreed that service of process in such suit may be made upon Messrs. Mendes & Mount, 27 William Street, NEW YORK, and that in any suit instituted against any one of them upon this contract, [the Retrocessionaires], will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.
>
> The above-named are authorised and directed to accept service of process on behalf of [Retrocessionaires] in any such suit and/or upon the request of [petitioner] to give a written undertaking to [petitioner] that [Mendes & Mount] will enter a general

> appearance upon [the Retrocessionaires'] behalf in the event such a suit shall be instituted.

Beginning in 1984, petitioner sought reimbursement for asbestos-related claims and submitted proofs of loss to Leslie & Godwin. In response, the Merrett Syndicate retained the law firm of Lord, Bissell & Brook to audit petitioner's payment of such claims, as the Retrocessionaires had the right to do under the treaties.

By 1991, the Retrocessionaires still had not reimbursed petitioner for its asbestos-related losses. In May, petitioner sent a demand for arbitration to Lord, Bissell & Brook directly. Lord, Bissell & Brook forwarded the demand to Leslie & Godwin, which responded to petitioner in June 1991, that it had "already advised the leading underwriter" and that it was "now proceeding to notify the remaining market." Leslie & Godwin told petitioner that "[a]s soon was we have contacted the full market, we will confirm this to you."

Since the signing of the treaties, Leslie & Godwin had not been sending information to respondent directly. Instead, it sent information to respondent in care of an Argentinean insurance brokerage, Argenhall, S.A., whose place of business is in Buenos Aires, Argentina. Consequently, after petitioner made its arbitration demand, Leslie & Godwin sent a letter on June 27, 1991, to respondent, in care of Argenhall, advising respondent that petitioner had demanded arbitration and that each Retrocessionaire was being asked to confirm that Lord, Bissell & Brook should represent the Retrocessionaires collectively. On July 22, 1991, Leslie &

Godwin sent a follow-up facsimile to respondent, also in care of Argenhall, requesting once more that respondent confirm the appointment of Lord, Bissell & Brook.

In August 1991, petitioner filed an action in the Circuit Court for Marathon County, Wisconsin, asking the court to compel the Retrocessionaires to proceed with arbitration. Respondent was named a respondent in the proceeding. Pursuant to the Service of Suit clause within the treaties, petitioner notified the Retrocessionaires of its filing of suit in Wisconsin state court by serving notice upon the firm of Mendes & Mount. (The record also establishes that respondent was notified of the filing of the present suit to confirm the arbitration award in the same way: by service upon Mendes & Mount.)

At first, some of the Retrocessionaires tried unsuccessfully to remove the Wisconsin state court proceeding to federal court. See Employers Insurance of Wausau v. Certain Underwriters at Lloyd's, London, 787 F. Supp. 165 (W.D. Wis.), aff'd sub. nom., In the Matter of Robin A. G. Jackson, 964 F.2d 706 (7th Cir. 1992). After proceedings returned to state court, issues concerning the enforcement of the arbitration clause and selection of arbitrators were litigated. See Employers Insurance of Wausau v. Robin A.G. Jackson, 178 Wis. 2d 755,505 N.W.2d 174 (Ct. App. 1993), aff'd, 190 Wis. 2d 597,527 N.W.2d 681 (1995). Eventually, by the summer of 1995, the clause was held enforceable, the arbitrators were named and the merits were resolved.

The arbitration panel issued its decision on September 18, 1995. The panel determined that petitioner was entitled to a total of $7,783,324 from the Retrocessionaires. Of this

amount, Respondent's share is $181,319. Additionally, the panel's order provides:

> If such amounts are not tendered by [the Retrocessionaires], either individually or collectively, within 45 days of the date of this award, the Panel makes the following additional awards:
>
> 1) Interest from the date of this award at a compound annual rate of 7.5%;
>
> 2) Attorneys fees and costs of $930,730 for which [the Retrocessionaires] are jointly and severally liable;
>
> 3) At the expiration of a period of 45 days following the date of this award, London respondents shall provide a Letter of Credit to Employers of Wausau in the amount of $9,000,000 in a form acceptable to the Wisconsin Insurance Department and to secure payment of the ultimate liability in this matter.

Respondent did not appear or participate in the arbitration or related judicial proceedings.

## DISPUTED FACTS

Respondent asserts that it was not a client of Lord, Bissell & Brook and that it did not participate in the audit

performed on behalf of the Retrocessionaires. Respondent denies that it received the June 27, 1991 letter or follow-up facsimile Leslie & Godwin sent to Argenhall and that its files contain any evidence that it received actual notice of the arbitration.

## OPINION

Two issues must be explored in resolving the cross motions to vacate and to confirm the arbitration award. First, because respondent is an arm of the Republic of Uruguay, the requirements of the Foreign Sovereign Immunities Act must be satisfied because the Act is the sole means of obtaining jurisdiction over a foreign state in federal court. See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428,434 (1989). Second, because Uruguay is a signatory of the Inter-American Convention on International Commercial Arbitration, the award may be vacated (and cannot be confirmed) if it was obtained, in violation of this treaty. Although the parties do not dispute that the Foreign Sovereign Immunities Act is satisfied and that this court may exercise jurisdiction over respondent, I will discuss the Act briefly to aid understanding of the disputed issue: whether the award was obtained in violation of the Inter-American Convention's notice provision.

### A. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act governs subject matter and personal jurisdiction in actions involving foreign states. Concerning subject matter jurisdiction, the Act is drafted in the negative. Federal district courts have subject matter jurisdiction provided the foreign state is *not* entitled to

immunity under the Act. See 28 U.S.C. § 1330(a). Also, federal courts may exercise personal jurisdiction over foreign states insofar as they have been given notice in accordance with the Act. See § 1330(b).

In this action, subject matter jurisdiction exists because the arbitration clause within the retrocessional treaties state that any arbitration "shall take place in Wausau, Wisconsin." Under the Foreign Sovereign Immunities Act, a foreign state has no immunity from a proceeding to confirm an arbitral award where the arbitration "is intended to take place in the United States." See § 1605(a)(6)(A). Alternatively, subject matter jurisdiction exists because confirmation of the award is sought under the Inter-American Convention. A foreign state has no immunity from a proceeding to confirm an award that "may be governed by a treaty . . . calling for the recognition and enforcement of arbitral awards." § 1605(a)(6)(B).

Moreover, because the Foreign Sovereign Immunities Act's notice requirements have been satisfied, this court may exercise personal jurisdiction over respondent. The parties agree that respondent is an "agency or instrumentality of a foreign state" under § 1603 (b). Under the Act, an agency or instrumentality of a foreign state has sufficient notice of a suit when the summons and complaint are delivered "in accordance with any special arrangement for service." See § 1608(b)(1). Respondent was notified of petitioner's intention to confirm the arbitral award pursuant to the Notice of Suit provision of the treaties: petitioner served a summons upon the Retrocessionaires' designated agent, Mendes & Mount.

B. Inter-American Convention on International Commercial Arbitration

The centerpiece of respondent's contention that the award must be vacated rests on Article 5 of the Inter-American Convention, which provides in pertinent part:

> 1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:
>
> * * *
>
> b. That the party against which the arbitral decision has been made was not *duly notified of the appointment of the arbitrator* or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense;

Inter-American Convention on International Commercial Arbitration, Jan. 1, 1975, reprinted in 9 U.S.C.A. § 301 (West Supp. 1998) (emphasis added).

There is little case law interpreting the Inter-American Convention. But respondent garnishes its presentation with case law interpreting the related Convention on the Recognition and Enforcement of Foreign Arbitral Awards, reprinted in 9 U.S.C.A. § 201 (West Supp. 1998), which is known commonly as the "New York Convention." It is a

good choice because the New York Convention contains a notice provision similar to that of the Inter-American Convention. Article V, § 1(b) of the New York Convention provides that a court may decline to confirm an award if the party resisting confirmation was not given "proper notice." See also Productos Mercantiles E Industriales, S.A.v. Faberge USA, Inc., 23 F.3d 41,45 (2d Cir. 1994) ("Congress intended the Inter-American Convention to reach the same results as those reached under the New York Convention.").

Turning to the meat, respondent first argues that notice of the arbitration, like notice of this lawsuit, should be evaluated under the notice provisions of the Foreign Sovereign Immunities Act. Respondent explains that petitioner's reliance on the lead Retrocessionaire to notify respondent of the arbitration was not part of a "special arrangement for service." See 28 U.S.C. § 1608(b)(1). Thus, because petitioner did not meet the alternative methods of service under the Act, such as registered mail sent directly to the agency or instrumentality, see § 1608(b)(3)(B), respondent did not receive adequate notice of the arbitration as a matter of law. In support of the contention that the Foreign Sovereign Immunities Act sets forth the standard for service of process in arbitration proceedings, respondent cites Matter of the Arbitration Between Trans Chem. Ltd. and China Nat'l Mach. Import &.Export Corp., 978 F. Supp. 266 (S.D.Tex. 1997), aff'd, 161 F.3d 314 (5th Cir. 1998).

This offering is indigestible. Respondent cannot find support in Trans Chemical Limited for its contention that the Foreign Sovereign Immunities Act sets forth a standard applicable to arbitration agreements. In Trans Chemical Limited, a privately-held Pakistani firm moved to confirm a

Texas arbitral award against a state-owned Chinese firm. The Chinese firm argued that the district court lacked jurisdiction to confirm the award because the motion to confirm had not been served in accordance with the Foreign Sovereign Immunities Act. See Trans Chemical Limited, 978 F. Supp. at 297. The court disagreed, noting that the agreement between the firms incorporated the Procedures of the American Arbitration Association and that the procedures provided for service by mail to the last known address of notice of judicial proceedings to confirm an arbitral award. Thus, the court concluded, the parties' agreement incorporated a "special arrangement for service" under 28 U.S.C. § 1608(b)(1). See Trans Chemical Limited, 978 F. Supp. at 298-99.

Respondent is correct that the court held that since the arbitration agreement entered into by the parties adopted the AAA, . . . rules this constituted 'special arrangement for service under the FSIA,'" see Respondent's Mem. in Supp. of Mot. to Vacate Award, dkt. #7, at 15, but the issue in Trans Chemical Limited was whether notice was sufficient for jurisdiction to exist *in the proceeding to confirm the award.* Contrary to respondent's claim, the court was not addressing the separate issue whether the award could be vacated because the Chinese firm did not have adequate notice *of the arbitration.*

Respondent tries another argument. It cites Parsons & Whitmore Overseas Co. v. Societe Generale de L' Industrie du Papier, 508 F.2d 969,975 (2d Cir. 1974), which holds that under the New York Convention, the adequacy of the arbitration notification should be measured in light of the forum state's standards of due process. Respondent cites

Dillon v. Dillon, 46 Wis. 2d 659, 176 N.W.2d 362 (1970), which sets forth the requirements of "jurisdictional due process" in Wisconsin:

> The first requirement is that the manner of service employed must be reasonably calculated to give actual notice. "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself *reasonably certain to inform those affected."*

Id. at 665-66, 176 N.W.2d at 365 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)). Respondent submits that petitioner's manner of notification was not reasonably calculated to inform respondent of its arbitration demand. Petitioner should have notified it directly, according to respondent; it was improper for petitioner to rely on Leslie & Godwin and the lead Retrocessionaire to act as intermediaries.

Respondent forgets that there were many Retrocessionaires and only one petitioner. In such circumstances, it is customary at Lloyd's for the party in petitioner's shoes to deal with only one lead underwriter. Respondent expects too much if it believes that petitioner should have searched the globe to confirm that every Retrocessionaire had notice of the arbitration. Indeed, it is

unsurprising that custom grants petitioner this advantage when one considers that the arbitration clause favors petitioner in another important respect: petitioner has the option of arbitrating in its home forum.

Perhaps one could argue that respondent's absence once the arbitration began should have alerted petitioner to the possibility that respondent had not been notified, but that argument has no force when one considers that petitioner had served notice upon Mendes & Mount when it brought the action in Wisconsin state court to compel the arbitration. After that time, petitioner had more reason to believe that respondent had *chosen* not to participate. See In the Matter of Robin A. G. Jack son, 964 F.2d 706, 771 (7th Cir. 1992) (observing that respondent had refused to answer the petition to compel arbitration that was filed in state court or join the petition of other Retrocessionaires to remove state proceedings to federal court). Moreover, respondent's stake in the outcome was low. Respondent's share of the risk translated to liability of roughly $181,000, or 2.3% of the total award. If petitioner assumed that respondent had elected to let the other Retrocessionaires represent its interests, it made a reasonable assumption.

Although it is disputed whether respondent had actual notice of the arbitration, this disputed fact has no effect. At the bottom line, 1) respondent bound itself to treaties containing an arbitration clause drafted in favor of petitioner; 2) custom holds that petitioner need only inform the lead Retrocessionaire of matters relating to the operation of the treaties; and 3) respondent effectively received notice of the arbitration when its designated agent was given notice that respondent was being sued in state court to compel such

arbitration. Respondent cannot complain to petitioner that the other Retrocessionaires or its designated agent failed to notify it of the arbitration, Petitioner's notification efforts were reasonable.

C. Confirmation of Award

In its reply brief in support of the motion to vacate the award, respondent raises new arguments relating to the merits of the award that I have construed as its objections to confirmation of the award. I conclude that they are without merit.

In addition to the base award of $181.319, the arbitration panel assessed three sanctions should the award not be satisfied in forty-five days: one, interest at a annual rate of 7.5%; two, a joint and several liability to pay petitioner's attorney fees of $930,730; and three, the obligation to procure a $9,000,000 letter of credit in favor of petitioner. Petitioner seeks to have the award confirmed in full. Respondent contends that confirmation of the award including the additional elements is "unjust and inequitable." See Resp't Br. in Reply, dkt. # 18, at 17-19.

With respect to the interest sanction, respondent contends that it should be entitled to the forty-five day grace period because its "failure to make timely payment was solely due to Wausau's failure to properly serve and give notice to Banco." Id. at 18. This contention presupposes that petitioner breached its duty to give notice of the arbitration. It is clear that petitioner met its obligation.

Second, respondent complains that it should not have to pay attorney fees amounting to more than five times its share of actual damages. But respondent has provided no factual support for the proposition that its fellow Retrocessionaires have failed to pay the $930,730 and that this award actually remains unsatisfied. Indeed, even if respondent will be forced to pay the full amount, it has a remedy: respondent may file suit against the other Retrocessionaires to collect the amount unfairly apportioned to it.

Last, respondent complains that petitioner has not explained to this court the need for the letter of credit. Clearly, the necessity for the letter of credit was a matter addressed at arbitration. Having failed to participate, respondent cannot question the conclusions of the panel.

D. Application of Inter-American Convention

I have applied the Inter-American Convention in this matter because the parties agree that it is applicable. However, one reservation to the United States' adoption of the treaty recognizes that parties to an international arbitration agreement may be citizens of nations that are signatories of both the Inter-American Convention and the New York Convention. In such circumstances, unless the arbitration agreement states which treaty applies, the reservation holds that Inter-American Convention should be applied only if a *majority* of the parties are citizens of nations that are signatories of the Inter-American Convention. See 9 U.S.C. § 305.

Although the United States and Uruguay are signatories of both treaties, petitioner and respondent have not provided information concerning the citizenship of the remaining Retrocessionaires. Hence, it is possible that the New York Convention is applicable in this matter. (The parties do not explain why they agree that the Inter-American Convention is applicable.) Nonetheless, the point appears to be technical. Because the two treaties are similar, applying the New York Convention instead of the Inter-American Convention would be unlikely to affect the outcome

**ORDER**

IT IS ORDERED that

1. The motion of respondent Banco Seguros del Estado to vacate the arbitral award in favor of petitioner Employers Insurance of Wausau is DENIED;

2. The motion of petitioner to confirm the award is GRANTED; and

3. The clerk of court is directed to enter judgment in favor of petitioner confirming the arbitral award and close the case.

Entered this 5thday of January, 1999.

BY THE COURT:

/s/_____
BARBARA B. CRABB
District Judge

## APPENDIX C

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed January 5, 1999]

No. 98-C-0521-C

| | |
|---|---|
| EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY, *Petitioner*, | ) |
| v. | ) |
| BANCO SEGUROS DEL ESTADO, *Respondent.* | ) |

## JUDGMENT IN A CIVIL CASE

This action came for consideration before the court with U.S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

## IT IS ORDERED AND ADJUDGED

that the motion of petitioner Employers Insurance of Wausau to confirm the arbitration award against respondent Banco

Seguros del Estado is GRANTED. Judgment is entered in favor of petitioner confirming the arbitral award and this case is CLOSED.

/s/_____ January 5, 1999
Joseph W. Skupniewitz, Clerk of Court Date

Approved as to form this 5th day of January, 1999.

/s/_____
BARBARA B. CRABB,
U.S. DISTRICT JUDGE

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed January 19, 2000]

No. 99-1304

| | |
|---|---|
| EMPLOYERS INSURANCE OF WAUSAU, *Plaintiff-Appellee*, | ) |
| v. | ) |
| BANCO DE SEGUROS DEL ESTADO, *Defendant-Appellant.* | ) |

Appeal from the United States District Court
for the Western District of Wisconsin

**Before**

Hon. RICHARD A. POSNER, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

**ORDER**

A petition for rehearing en banc was filed in the above case. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the original panel have voted to deny the petition for rehearing. The petition for rehearing is therefore DENIED.

*Court of Appeals Order & Certificate of Interest* - 1/19/00

CERTIFICATE OF INTEREST

Appellate Court No: 99-1304

Short Caption: Employers Insurance of Wausau v. El Banco de Seguros del Estado

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information in compliance with Circuit Rule 26.1. NOTE: Counsel is required to complete the entire certificate and to use N/A for any information that is not applicable.

(1) The full name of every party or amicus the attorney represents in the case:

El Banco de Seguros del Estado

(2) If such party or amicus is a corporation:

i) Its parent corporation, if any; and

N/A

ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party amicus:

N/A

(3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

Byrne, Goyke, Tillish & Higgins, S.C.
Moreira Law Firm, P.C.

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The attorney furnishing the certificate must file an amended certificate to reflect any material changes in the required information. The text of the certificate (i.e. caption omitted) shall also be included in from of the table of contents of the party's main brief.

| | |
|---|---|
| Attorney's Signature: | /s/_____ |
| Date: | 12/27/99 |
| Attorney's Printed Name: | James A. Higgins |
| Address: | P.O. Box 1566<br>115 Forest Street,<br>Wausau, WI 54402-1566 |
| Phone Number: | (715) 848-2966 |

Amended 10/6/97

## APPENDIX E

## UNITED STATES CODE ANNOTATED
## TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
## PART IV–JURISDICTION AND VENUE
## CHAPTER 85–DISTRICT COURTS; JURISDICTION

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Current through P.L. 105-220, approved 8-7-1998

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any

transaction or occurrence enumerated in sections 1605-1607 of this title.

CREDIT(S)

1993 Main Volume

(Added Pub.L. 94-583, § 2(a), Oct. 21, 1976, 90 Stat. 2891.)

## HISTORICAL AND STATUTORY NOTES

Effective Dates

1976 Acts. Section effective 90 days after Oct. 21, 1976, see section 8 of Pub.L. 94-583, set out as a note under section 1602 of this title.

## AMERICAN LAW REPORTS

Effect of Foreign Sovereign Immunities Act (28 USCA §§ 1330, 1441(d), 1602 et seq.) On right to jury trial in action against foreign state. 56 ALR Fed 679.

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## FOREIGN SOVEREIGN IMMUNITIES ACT

28 USCA § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and

litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

CREDIT(S)

1994 Main Volume

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

## HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1976 Acts. House Report No. 94-1487, see 1976 U.S. Code Cong. and Adm. News, P. 6604.

Effective Dates

1976 Acts. Section 8 of Pub.L. 94-583 provided that: "This Act [enacting this chapter and section 1330 of this title, amending sections 1332, 1391, and 1441 of this title, and enacting provisions set out as notes under this section] shall take effect ninety days after the date of its enactment [Oct. 21, 1976]."

Separability of Provisions

Section 7 of Pub.L. 94-583 provided that: "If any provision of this Act [enacting this chapter and section 1330 of this title, amending sections 1332, 1391, and 1441 of this title, and enacting provisions set out as notes under this section and section 1 of this title] or the application thereof to any foreign state is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable."

Short Title

1976 Acts. Authorization to cite Pub.L. 94-583, which enacted this chapter, as the "Foreign Sovereign Immunities Act of 1976", see section 1 of Pub.L. 94-583, set out as a note under section 1 of this title.

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28 USCA §1603. Definitions

For purposes of this chapter

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity–

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of those shares or other ownership interest is owned by a foreign state or political subdivision thereof, and . . . .

---

28 USCA §1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

---

28 USCA § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon

an act outside the territory of the Untied States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) In which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the Untied States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the Untied States acquired by succession or gift or rights in immovable property situated in the Untied States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the Untied States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to–

(a) any claim based upon the exercise or performance of the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(b) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contact rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph–

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or

section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act; and

(B) even if the foreign state is or was so designated, if-

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term in defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That-

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the

suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph(1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned an possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court , except that the court may not award judgment against the foreign state in an amount greater that the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the Unti4ed States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following).

Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suite in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a) –

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) **Limitation on discovery.-**

(1) **In general. – (A)** Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the

Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) **Sunset.– (A)** Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law

enforcement agencies m investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction m such case.

(3) **Evaluation of evidence**.--The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) **Bar on motions to dismiss**.- A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) **Construction**.- Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 USCA § 1606

1606. **Extent of liability**

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was

caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

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28 USCA § 1607

1607. **Counterclaims**

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim–

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of he foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

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28 U.S.C.A. § 1608

1608. **Service; time to answer; default**

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(l) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services – and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a) (4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

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28 USCA § 1609

1609. **Immunity from attachment and execution of property of a foreign state**

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

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28 USCA § 1610

1610. **Exceptions to the immunity from attachment or execution**

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken n violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or

hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if–

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under Section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d)

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28 USCA § 1611

1611. **Certain types of property immune from execution**

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

## APPENDIX F

### INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

The Governments of the Member States of the Organization of American States, desirous of concluding a convention on international commercial arbitration, have agreed as follows:.

Article 1

An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.

Article 2

Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or Juridical person.
Arbitrators may be nationals or foreigners.

Article 3

In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.

Article 4

An Arbitration decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.

Article 5

1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:

a. That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted It, or, if such law is not specified, under the law of the State in which the decision was made; or

b. That the party against which the arbitral decision has bee made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or

c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted

to arbitration, the former may be recognized and executed; or

d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or

e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:

a. That the subject of the dispute cannot be settled by arbitration under the law of the State; or

b. That the recognition or execution of the decision would be contrary to the public policy ("ordre public") of that State.

Article 6

If the competent authority mentioned in Article 5.1.2 has been requested to annul or suspend the arbitral decision, the authority before which such decision is invoked may, if it deems it appropriate, postpone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to provide appropriate guaranties.

Article 7

This Convention shall be open for signature by the Member States of the Organization of American States.

Article 8

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 9

This Convention shall remain open for accession by any other State. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 10

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instruction of ratification.

For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 11

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 12

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 13

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the Member States of the Organization of American

States and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the declarations referred to in Article 11 of this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE AT PANAMA CITY, Republic of Panama, this thirtieth day of January one thousand nine hundred and seventy-five.

[Signatures omitted]

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:
**Signatories**. The following States are parties to the Inter-American Convention on International Commercial Arbitration, done at Panama City January 30, 1975, entered into force for the United States October 27, 1990:

Chile
Colombia
Costa Rica
El Salvador
Guatemala
Honduras
Mexico
Panama
Paraguay

United States
Uruguay
Venezuela

**Reservations of United States**. The instrument of ratification provided by the United States contained the following reservations:

> "1. Unless there is an express agreement among the parties to an arbitration agreement to the contrary, where the requirements for application of both the Inter-American Convention or International Commercial Arbitration and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards are met, if a majority of such parties are citizens of a state or states that have ratified or acceded to the Inter-American Convention and are member states of the Organization of American States, the Inter-American Convention shall apply. In all other cases, the Convention on the recognition ands Enforcement of Foreign Arbitral Awards shall apply.
> "2. The United States of America will apply the rules of procedure of the Inter-American Commercial Arbitration Commission which are in effect on the date that the United States of America deposits is instrument of ratification, unless the United States of America makes a later official determination to adopt and apply subsequent amendments to such rules.
> "3. The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."

## APPENDIX G

## TITLE 9. ARBITRATION
## CHAPTER 2-CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS
## 9 USCA § 201

## CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall, also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each ease but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention

only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them m respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them m accordance with the rules of procedure of the territory, where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or

enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply;

(a) The duly authenticated original award or a duly certified copy thereof.

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them,

under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contain decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country, where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that county, or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the county where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 [27 LNTS 157; 92 LNTS 301] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice [T.S. 993; 59 Stat. 1055], or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories subject, where necessary, for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the Federal Government shall to

this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention alter the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contacting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Done at New York June 10, 1958: entered into force for the United States December 29, 1970, subject to declarations. Implementing Legislation Pub.L. 91-368, 84 Stat. 692, 9 USC 201-208

States which are parties:

Algeria
Antigua and Barbuda
Argentina
Australia
Austria
Bahrain

Bangladesh
Barbados
Belarus
Belgium
Bolivia
Bosnia and Herzegovina
Botswana
Brunei Darussalam
Bulgaria
Burkina Faso
Cambodia
Cameroon
Canada
Central African Republic
Chile
China
Colombia
Costa Rica
Cote d'Ivoire
Croatia
Cuba
Cyprus
Czechoslovakia
Czech Republic
Dahomey
Denmark
Djibouti
Dominica
Ecuador
Egypt
Estonia
Finland
France [Withdrew declaration eff. Nov. 27, 1989]

Georgia
German Democratic Republic
Germany, Fed. Rep.
Ghana
Greece
Guatemala
Guinea
Haiti
Holy See
Hungary
India
Indonesia
Ireland
Israel
Italy
Japan
Jordan
Kazakstan
Kenya
Korea
Kuwait
Latvia
Lesotho
Lithuania
Luxembourg
Former Yugoslav Republic of Macedonia
Madagascar
Malaysia
Mali
Mauritius
Mexico
Monaco
Mongolia

Morocco
Netherlands
New Zealand
Niger
Nigeria
Norway
Panama
Peru
Philippines
Poland
Portugal
Romania
Russian Federation
San Marino
Saudia Arabia
Senegal
Singapore
Slovakia
Slovenia
South Africa
Spain
Sri Lanka (Ceylon)
Sweden
Switzerland
Syrian Arab Rep.
Tanzania
Thailand
Trinidad and Tobago
Tunisia
Turkey
Uganda
Ukraine
United Kingdom

United States
Uruguay
Uzbekistan
Venezuela
Vietnam
Yugoslavia
Zimbabwe

## APPENDIX H

### Wisconsin 1995-96 Statutes

**601.73 Procedure for service of process through state officer.**

(1) REQUIREMENTS FOR EFFECTIVE SERVICE. Service upon the commissioner or department of financial institutions under § 601.72 is service on the principal, if:

(a) Two copies of the process are left in the hands or office of the commissioner or department of financial institutions respectively; and

(b) The commissioner or department of financial institutions fails a copy of the process to the person served according to sub. (2)(b).

(2) COMMISSIONER'S ACTION. (a) *Records.* The commissioner and department of financial institutions shall give receipts for and keep records of all process served through them.

(b) *Process mailed.* The commissioner or department of financial institutions shall send immediately by certified mail to the person served, at the person's last-known principal place of business, residence or post-office address or at an address designated in writing by the person, one copy of any process received and shall obtain the other copy.

(c) *Default judgment.* No plaintiff or complainant is entitled to a judgment by default in any proceeding in which process is served under this section and § 601.72 until the expiration of (–) days from the date of mailing of the process under par. (b).

(3) PROOF OF SERVICE. A certificate by the commissioner or the department of financial institutions, showing service made upon the commissioner or department of financial institutions, and attached to a copy of the process presented for that purpose is sufficient evidence of the service.

## APPENDIX I

### Wisconsin 1995-96 Statutes

### 788.03 Court order to arbitrate; procedure.

The party aggrieved by the alleged failure, neglect or refusal of another to perform under a written agreement for arbitration, may petition any court of record having jurisdiction of the parties or of the property for an order directing that each arbitration proceed as provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made as provided by law for the service of a summons. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the Agreement. If the making of the arbitration agreement or the failure, neglect or refusal to perform the same is in issue, the court shall proceed summarily to the trial thereof. If no jury trial is demanded the court shall hear and determine such issue. Where such an issue is raised, either party may, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue to a jury called and impaneled as provided in § 756.096. If the jury finds that no agreement in writing for arbitration was made or that there is no default in proceeding hereunder, the proceeding shall be dismissed. If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court

shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

## APPENDIX J

### Wisconsin 1995-96 Statutes

### 801.09 Summons, contents of.

The summons shall contain:

(1) The title of the cause, specifying the name of the court which the action is brought, the name of the county designated y the plaintiff as the place of trial, the standardized description of the case classification type and associated code number as approved by the director of state courts and the names and addresses of the parties to the action, plaintiff and defendant.

(2) A direction to the defendant summoning and requiring defendant to serve upon the plaintiff's attorney, whose address hall be stated in the summons, either an answer to the complaint - a copy of the complaint is served with the summons or a demand ir a copy of the complaint. The summons shall further direct the defendant to serve the answer or demand for a copy of the complaint:

(a) Within 20 days, or within 45 days if the defendant is the state or an officer, agent, employee or agency of the state in an action or special proceeding brought within the purview of § 893.82 or 895.46, exclusive of the day of service, after the summons has been served personally upon the defendant or served by substitution personally upon another authorized to accept service of the summons for the defendant; or

(b) Within 40 days after a date stated in the summons, exclusive of such date, if no such personal or substituted personal service has been made, and service is made by publication. The date so stated in the summons shall be the date f the first required publication.

(3) A notice that in case of failure to serve an answer or demand for a copy of the complaint within the time fixed by sub. (2), judgment will be rendered against the defendant according to he demand of the complaint. The summons shall be subscribed with he handwritten signature of the plaintiff or attorney with the addition of the post-office address at which papers in the action may be served on the plaintiff by mail, plaintiff's or attorney's telephone number, and, if by an attorney, the attorney's state bar number, if any. If the plaintiff is represented by a law firm, the summons shall contain the name and address of the firm and shall be subscribed with the handwritten signature and state bar number, if any, of one attorney who is a member or associate of such firm. When the complaint is not served with the summons and the only relief sought is the recovery of money, whether upon tort or contract, there may, at the option of the plaintiff, be added at the foot a brief note specifying the sum to be demanded y the complaint.

(4) There may be as many authenticated copies of the summons and the complaint issued to the plaintiff or counsel as are needed for the purpose of effecting service on the defendant. Authentication shall be accomplished by the clerk's placing a filing stamp indicating the case number on each copy of the summons and the complaint.

## APPENDIX K

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WISCONSIN**

[Dated July 22, 1998]

No. 98 c 0521 C

| | |
|---|---|
| EMPLOYERS INSURANCE OF WAUSAU A MUTUAL COMPANY, *Petitioner*, | ) |
| v. | ) |
| BANCO DE SEGUROS DEL ESTADO, *Respondent*. | ) |

**SUMMONS IN A CIVIL ACTION**

TO: (Name and Address of Defendant)
Banco de Seguros del Estado
Mercedes 1051
Montevideo, Uraguay

**YOU ARE HEREBY SUMMONED** and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Jeffrey J. Kassel
LaFollette & Sinykin
One East Main Street
Suite 500
P.O. Box 2719
Madison, WI 53701-2719

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JOSEPH W. SKUPNIEWITZ — JUL 22 1998

CLERK — DATE

BY DEPUTY CLERK

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WISCONSIN**

[Dated July 22, 1998]

No. 98 c 0521 C

| | |
|---|---|
| EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY, *Petitioner*, | ) |
| v. | ) |
| BANCO DE SEGUROS DEL ESTADO, *Respondent*. | ) |

## PETITION TO CONFIRM ARBITRATION AWARD

Petitioner Employers Insurance of Wausau, through its undersigned counsel, petitions the Court, pursuant to the Inter-American Convention on International Commercial Arbitration, 9 U.S.C. §§ 301-307, for an order confirming and enforcing an arbitration award entered in an arbitration between petitioner and respondent Banco de Seguros del Estado.

## PARTIES

1. Petitioner Employers Insurance of Wausau ("Wausau") is a mutual insurance company organized under

the laws of the State of Wisconsin with its principal place of business at 2000 Westwood Drive, Wausau, Wisconsin 54401.

2. Respondent Banco de Seguros del Estado ("Banco") is the State Insurance Bank of Uruguay with its principal place of business at Mercedes 1051, Montevideo, Uruguay. Banco is an instrumentality of the Sovereign Republic of Uruguay and as such is a foreign state within the meaning of 28 U.S.C. § 1603.

## JURISDICTION AND VENUE

3. The Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 1330(a) and 1331 and 9 U.S.C. §§ 203 and 302.

4. The Court has personal jurisdiction over Banco pursuant to 28 U.S.C. §§ 1330(b).

5. Venue is proper in this district pursuant to 9 U.S.C. §§ 204 and 302.

## BACKGROUND

6. Between 1966 and 1973, Wausau entered into a series of contracts known as excess retrocessional insurance treaties (the "Treaties") with Certain London Market Insurance Companies, including Banco, and Certain Underwriters at Lloyd's, London (collectively, the "Retrocessionaires"). Under the Treaties, Banco and the

other Retrocessionaires reinsured Wausau's reinsurance contracts with other insurance companies. Banco and the other retrocessionaires agreed to reimburse Wausau for specified percentages of the losses paid by Wausau under original reinsurance contracts that came within the coverage afforded by the Treaties.

7. The Treaties are identical in all relevant respects, except for the specific percentages of reinsurance coverage allocated to particular Retrocessionaires under the various Treaties. All of the Treaties contain an arbitration clause, which provides as follows:

> If any dispute or difference of opinion shall arise with reference to the interpretation of this Agreement or the rights with respect to any transaction involved, the dispute shall be referred to three arbitrators, who shall be executive officers of insurance companies domiciled in the U.S.A., one to be chosen by [Wausau], one to be chosen by the Retrocessionaire, and the third by the two arbitrators so chosen within 30 days of their appointment. If either party refuses or neglects to appoint an arbitrator within 30 days after the receipt of written notice from the other party requesting it to do so, the requesting party may nominate two arbitrators, who shall choose the third. Each party shall submit its case to the arbitrators within 30 days of the appointment of the arbitrators. The arbitrators shall consider the Agreement an honorable engagement rather than merely a

> legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law. The decision of a majority of the arbitrators shall be final and binding on both parties. The expense of the arbitrators and of the arbitration shall be equally divided between each party. Any such arbitration shall take place in Wausau, Wisconsin, unless some other location is mutually agreed.

8. The Treaties also contain a provision entitled Service of Suit Clause (U.S.A.), which provides as follows:

> It is agreed that in the event of the failure of [Retrocessionaires] to pay any amount claimed to be due hereunder, [Retrocessionaires], at the request of [Wausau], will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.
>
> It is further agreed that service of process in such suit may be made upon Messrs. Mendes & Mount, 27 William Street, NEW YORK, and that in any suit instituted against any one of them upon this contract, [Retrocessionaires] will abide by the final

> decision of such Court or of any Appellate Court in the event of an appeal.
>
> The above-named are authorised and directed to accept service of process on behalf of [Retrocessionaires] in any such suit and/or upon the request of [Wausau] to give a written undertaking to [Wausau] that [Mendes & Mount] will enter a general appearance upon [Retrocessionaires'] behalf in the event such a suit shall be instituted.
>
> Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, [Retrocessionaires] hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as [Retrocessionaires'] true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of [Wausau] or any beneficiary hereunder arising out of this contract of reinsurance, and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

9. Article XIX of the Treaties designated Pritchard & Baird, Inc., as the "intermediary . . . through whom all communications and transactions relating thereto shall be transmitted by both parties." Following the

insolvency and demise of Pritchard & Baird in 1975, the parties to the Treaties used Leslie & Godwin, Ltd., as the intermediary.

10. Beginning in 1984, Wausau submitted proofs of loss under the Treaties to Leslie & Godwin and to the Retrocessionaires' law firm, Lord, Bissell & Brook. Pursuant to the Treaties, the Retrocessionaires exercised their right to perform an audit of Wausau's payment of asbestos-related claims. That audit was performed on behalf of all of the Retrocessionaires by Lord, Bissell & Brook.

11. The Retrocessionaires failed to pay Wausau amounts due under the Treaties for asbestos-related losses. Accordingly, on May 27, 1991, Wausau sent a demand for arbitration to Lord, Bissell & Brook. A true copy of the demand letter is attached as Exhibit A.

12. By letter dated June 26, 1991, Leslie & Godwin informed Wausau's counsel that Lord, Bissell & Brook had forwarded Wausau's arbitration demand to Leslie & Godwin and that Leslie & Godwin was "proceeding to notify the remaining market" of the demand. A true copy of that letter is attached as Exhibit B.

13. In a letter dated June 27, 1991, Leslie & Godwin notified Banco of Wausau's arbitration demand and asked for confirmation that Lord, Bissell & Brook was to represent Banco in the arbitration. A true copy of that letter is attached as Exhibit C.

14. In a facsimile transmission to Banco dated July 22, 1991, Leslie & Godwin requested an answer to its June

27, 1991 letter. A true copy of that document is attached as Exhibit D.

15. On August 19, 1991, Wausau petitioned the Marathon County Circuit Court for an order confirming the appointment of the party arbitrators and compelling the Retrocessionaires to proceed with the arbitration. Appendix "A" of the petition identified Banco as one of the London Market Company Retrocessionaires against which Wausau sought the order compelling arbitration. The petition was served on Mendes & Mount and on the Wisconsin Commissioner of Commissioner, both of which are designated in the Treaties' Service of Suit Clause as the Retrocessionaires' agents for services of process. Wausau also sent the petition to Lord, Bissell & Brook and to Leslie & Godwin. True copies of the petition and its Appendix "A" are attached as Exhibit E.

16. On September 9, 1991, all of the Retrocessionaires except Banco, St. Helens Insurance Company and La Preservatrice removed the Marathon County Circuit Court case to the United States District Court for the Western District of Wisconsin.

17. The district court, the Hon. Barbara B. Crabb, presiding, twice remanded the case to the state court, and the United States Court of Appeals for the Seventh Circuit upheld that remand. *In the Matter of the Arbitration Between Employers Insurance of Wausau v. Certain Underwriters at Lloyd's, London*, 787 F. Supp. 165 (W.D. Wis.), *aff'd sub. nom., In re Jackson,* 964 F.2d 706 (7th Cir. 1992).

18. By orders dated October 14, 1992, and December 23, 1992, the Marathon County Circuit Court granted Wausau's petition, confirmed the party arbitrators and ordered the parties to proceed with the arbitration. The Wisconsin Court of Appeals affirmed the circuit court's order, *Employers Insurance of Wausau v. Robin A.G. Jackson,* 178 Wis.2d 755, 505 N.W.2d 147 (Ct. App. 1993), and on February 28, 1995, the Wisconsin Supreme Court unanimously affirmed as well. *Employers Insurance of Wausau v. Robin A.G. Jackson,* 190 Wis.2d 597, 527 N.W.2d 681 (1995). The ensuing arbitration was conducted during the summer of 1995.

19. In a letter dated August 21, 1995, Leslie & Godwin notified Banco that "your company, as a Reinsurer on the Second and Third Layers [of the Treaties], has been declared a party to this latest arbitration proceeding and Lord Bissell & Brook has requested that you advise whether you wish them to represent you in this matter." A true copy of that letter is attached as Exhibit F.

20. On September 18, 1995, the arbitrators issued a final award in favor of Wausau. The panel found that Wausau was entitled to receive a total of $7,783,324 from the Retrocessionaires under all of the Treaties for the Treaty Years from July 1, 1966 through July 1, 1973. In addition, the panel ordered that, if any Retrocessionaire did not tender its portion of the award within 45 days of the date of the award, the non-tendering Retrocessionaire would be required to (1) pay interest from the date of the award at a compound annual rate of 7.5 percent; (2) pay Wausau's attorneys' fees and costs of $930,730, for which the non-tendering Retrocessionaires would be jointly and severally liable; and

(3) provide a $9 million letter of credit to Wausau to secure payment of the Retrocessionaire's ultimate liability. A true copy of the award is attached as Exhibit G.

21. Banco's share of the $7,783,324 arbitration award is $141,319, which Banco has not paid. Because Banco did not pay its portion of the award within 45 days of the date of the award, Banco is also obliged to pay interest and attorneys' fees and to provide a letter of credit as provided in the award.

22. On September 18, 1995, Wausau filed a motion with the Marathon County Circuit Court to confirm the arbitration award and for entry of judgment on the award pursuant to the Wisconsin Arbitration Act, Wis. Stats. §§ 788.01 et seq., and the Federal Arbitration Act 9 U.S.C. § 1 et seq.

23. On October 19, 1995, the Marathon County Circuit Court entered a Final Judgment confirming the award.

24. On June 4, 1996, the Wisconsin Court of Appeals affirmed the circuit court's confirmation of the award. *Employers Insurance of Wausau v. Certain Underwriters at Lloyd's, London,* 202 Wis.2d 673, 552 N.W.2d 420 (Ct. App. 1996).

25. Banco did not appear or participate in the arbitration or related judicial proceedings despite receiving notice of the arbitration and being served pursuant to the Treaties with the petition to compel arbitration.

26. The arbitration award is subject to Inter-American Convention on International Commercial

Arbitration (the "Inter-American Convention"), which governs the recognition and enforcement of commercial arbitration awards between parties that are citizens of the signatory states, because both the United States and Uruguay are signatories of the Inter-American Convention. The Inter-American Convention is enforced in United States courts pursuant to 9 U.S.C. §§ 301-307.

27. Pursuant to 9 U.S.C. § 302, Sections 202 through 205 and 207 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 U.S.C. §§ 202-205, 207) apply to arbitration awards subject to the Inter-American Convention. Section 207 provides that "[w]ithin three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for any order confirming the award against any other party to the arbitration." Section 207 further provides that the "court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition of enforcement of the award specified in the said Convention." None of the grounds for refusal or deferral of an award specified in the Inter-American Convention apply to the arbitration award between Wausau and Banco.

WHEREFORE, Employers Insurance of Wausau requests that the Court confirm the September 18, 1995 arbitration award and enter judgment on the award requiring Banco de Seguros del Estado to:

1) pay the sum of $181,319, representing Banco's share of the principal amount of the arbitration award;

2) pay interest on $181,319 as provided in the arbitration award at a compound annual rate of 7.5 percent from September 18, 1995;

3) pay Wausau's attorneys' fees of $930,730 as provided in the arbitration award; and

4) procure a $9 million letter of credit in favor of Wausau in a form satisfactory to the Insurance Commissioner of the State of Wisconsin to secure payment of Banco's obligations under the Treaties.

Dated: July 22, 1998.

LA FOLLETTE & SINYKIN

By: _____

Jeffrey J. Kassel
State Bar No. 1009170
Timothy J. Muldowney
State Bar No. 1017596
One East Main Street
P.O. Box 2719
Madison, WI 53701-2719
(608) 257-3911

Dale I. Larson
Zelle & Larson LLP
33 South Sixth Street
Suite 4400 - City Center
Minneapolis, MN 55402
(612) 339-2020
Attorneys for Plaintiff
Employers Insurance of Wausau

**EXHIBIT A**

ZELLE & LARSON

BOSTON
DALLAS
MINNEAPOLIS
SAN FRANCISCO

612-339-2020
FAX612.336-9100
DALE I. LARSON
612-336-9102

33 SOUTH SIXTH STREET
CITY CENTER-SUITE 4400
MINNEAPOLIS, MINNESOTA 55402

May 27, 1991

Thomas W. Dempsey, Esq.
**LORD, BISSELL & BROOK**
115 South LaSalle Street
Chicago, IL 60603

**Re:** **London Blanket Excess Retrocessional Reinsurance Policy Nos:**
**(1966) U70319, C/N 10679;**
**(1967) U70319, C/N 10679, End U72200;**
**(1968) U70319, C/N 10679, End U75249;**
**(1969) U76690, C/N 10679;**
**(1970) U76690, C/N 17769, End FTL000256;**
**(1971) U76690; C/N 71244, End FTL000780;**
**(1972) U76690, C/N71244, End FTL001237;**

**Claims:** **London Denial of Asbestos-Related Product Liability Claims Dated August 18, 1988**

**Our File No. 1-033-0001**

Dear Tom:

On behalf of Wausau, we request arbitration to resolve the Wausau asbestos claims that London reinsurers consolidated for resolution by common denial on August 18, 1988. Wausau's additional claims arising out of that denial are outlined in its consolidated response dated January 11, 1989. London's denial and Wausau's response are enclosed.

Wausau agrees with London's consolidation of Wausau's claims for resolution because one panel must determine any basis for the consolidated, common denial and assess the conduct surrounding that denial, as well as the damages flowing from it. Mr. William W. Fox, President and Chief Operating Officer, Providence Washington Insurance Company, is designated as Wausau's party arbitrator.

We should also agree that Wausau may invite cedents to participate so the common issues affecting privies can be resolved efficiently and consistently, as well as to help the panel factually address the so-called "ground up" issues that your clients have alleged.

I assume that we will be able to agree on a location for the panel, as well as a timetable or other issues concerning selection of party arbitrators and an umpire. This request involves all existing and future asbestos claims affected by your clients' denial. I look forward to hearing from you promptly.

Sincerely,

**ZELLE & LARSON**

/s/_____
Dale I. Larson

DIL/mlj
Enclosures

cc: Paul N. Steinlage
John A. Trucco, Jr.

**EXHIBIT B**

Leslie & Godwin
LESLIE & GODWIN TECHNICAL SERVICES LIMITED
*Agent for Leslie & Godwin Limited - Lloyd's Insurance Brokers*

Zelle & Larson
33 South Sixth Street
City Center-Suite 4400
Minneapolis, Minnesota 55402

26th June 1991

For the attention of Mr Dale I Larson

Re: London Blanket Excess Retrocessional Reinsurance Policy Nos:
(1966) U70319, C/N 10679
(1967) U70319, C/N 10679 End U72200
(1968) U70319, C/N 10679, End U75249
(1969) U76690, C/N 10679,
(1970) U76690, C/N 17769, End FTL000256
(1971) U76690, C/N 71244, End FTL000780
(1972) U76690, C/N 71244, End FTL001237

Claims: London Denial of Asbestos-Related Product Liability Claims Dated August 18 1988
Your File No. 1-033-0001

Dear Sirs,

With reference to the above captioned matter, your letter dated 27th May 1991 to Mr Thomas W Dempsey at Lord,

Bissell & Brook, was received here, together with Lord Bissell & Brooks covering letter dated 13th June, on 20th June. In view of the fact that Pritchard & Baird are no longer in business, we have been requested to circulate the notice of arbitration. We have already advised the leading underwriter, on 24th June, and are now proceeding to notify the remaining market.

As soon as we have contacted the full market, we will confirm this to you.

Yours faithfully,

/s/_____
L W House
Assistant Director

6 Braham Street London El 8ED
*Telephone* 071-480 7200 *Telex* 8950221 CORPCO G
*Fax* 071-480 7450 & 071-334 0086
Reg. office: 6 Braham Street, London E1 8ED
Reg no: 1629502 England

**EXHIBIT C**

Leslie & Godwin
LESLIE & GODWIN TECHNICAL SERVICES LIMITED
*Agent for Leslie & Godwin Limited - Lloyd's Insurance Brokers*

El Banco
Argenhall SA
San Martin Street No 558
1004 Buenos Aires
Argentina

June 27, 1991

R/I Employers Mutual of Wausau
Notification of Arbitration
1966 - 1972 inclusive 1st Excess Coverage

Dear Sirs,

We have recently received notice of Arbitration from Employers Mutual of Wausau's Attorney Zelle & Larson, via Lord Bissell & Brook.

The leading Reinsured has been advised, and has requested that we seek written confirmation from each reinsurer that Lord Bissell & Brook should represent underwriters interests in this arbitration.

Accordingly we have attached breakdown identifying your participations.

We also enclose an agreement to Lord Bissell & Brook's representation, in duplicate, and would ask you to sign one copy, by way of your confirmation, and return it to us as soon as possible.

Should you require any clarification please do not hesitate to contact the undersigned.

Yours faithfully,

/s/_____
L W House
Assistant Director

**EXHIBIT D**

FACSIMILE

*Leslie & Godwin Group*

GROUPS 2&3

P.O. BOX 219, 6 BRAHAM STREET, LONDON, E1 8ED
TELEPHONE 01-480 7200
TELEX: 8950221/929091 CORPCO G FAX: 01-480 7450

To: El Banco c/o Argenhall Attention: Claims Department
Town & Country: Argentina
From: S. Mason Department: _____
Date: 22 July 91 Authorization: _____

No. Pages: 1 Fax No.: 010 5413259771

**MESSAGE**

R/I Employers Mutual of Wausau
Notification of Arbitration
1966 - 1972 Inclusive 1st Excess Coverage

Further to our letter dated 27th June 1991 (via Courier) concerning the above account. In view of time constraints it is imperative we have an answer from you by return.

Regards

S L Mason

**EXHIBIT E**

STATE OF WISCONSIN CIRCUIT COURT #2
MARATHON COUNTY

[Dated August 19, 1991]

No. 91 CV 529

| | |
|---|---|
| In the Matter of the Arbitration between: | ) |
| EMPLOYERS INSURANCE OF WAUSAU A MUTUAL COMPANY, *Petitioner*, | ) |
| and | ) |
| CERTAIN UNDERWRITERS AT LLOYD'S, LONDON and CERTAIN LONDON MARKET INSURANCE COMPANIES, including those identified in the Appendix, *Respondents*. | ) |

**PETITION TO COMPEL ARBITRATION AND NOTICE OF APPLICATION FOR ORDER COMPELLING ARBITRATION**

PLEASE TAKE NOTICE that at a time and place to be assigned by this honorable Court, no earlier than five days after service hereof, Petitioner Employers Insurance of Wausau, a Mutual Company, will apply to the Court for an order compelling arbitration pursuant to this Petition. For its Petition to compel arbitration, Petitioner alleges as follows:

1. Petitioner Employers Insurance of Wausau (hereafter "Wausau" is a Wisconsin corporation with its principal place of business located in Wausau, Wisconsin.

2. The respondent Underwriters at Lloyd's are individuals engaged in the business of underwriting insurance and reinsurance risks at Lloyds of London, England. The respondent London Companies are corporations doing business in London, England. Both the Lloyd's respondents and the London Company respondents are regularly engaged in the business of insurance in the State of Wisconsin. At all times relevant, said respondents did business and entered into contracts with plaintiff in the State of Wisconsin. The individual Lloyd's underwriters and London Companies are hereinafter collectively referred to as "London".[1]

---

[1] A comprehensive identification of the respondents referred to as "London" is provided in Appendix "A" attached hereto. Each of the individual or corporate respondents participated in one or more of the subject policies of reinsurance.

3. The Court has subject matter jurisdiction pursuant to the Wisconsin Arbitration Act § 788.01 and, pursuant to the specific consent of the parties in the "Service of Suit Clause USA" clause contained in the parties' contracts.

4. Petitioner and respondents are parties to certain contracts of reinsurance, referred to as blanket excess retrocessional reinsurance treaties (hereinafter referred to as "the reinsurance treaties"; copies of the reinsurance treaties are attached to the Affidavit of John Trucco submitted herewith) the terms of which extend from July 1, 1966 to June 30, 1973. Pursuant to such treaties, London agreed to reinsure Wausau for 95% of its ultimate net loss over and above initial net loss of $200,000, for certain kinds of risks specified in the treaties.

5. Pursuant to the aforesaid treaties, London agreed to be unconditionally bound by Wausau's loss settlements. Beginning in 1984, Wausau began making and paying asbestos loss settlements, and duly submitted proofs of loss to London for payment of their share of the settlements under the reinsurance treaties. After extensive delay, London began to deny payment for such loss settlements, beginning on August 22, 1988.

6. The reinsurance treaties each contain an arbitration agreement, the terms of which are set forth in Article XVII of the reinsurance treaties as follows:

> If any dispute or difference of opinion shall arise with reference to the interpretation of this Agreement or the rights with respect to any

> transaction involved, the dispute shall be referred to three arbitrators, who shall be executive officers of insurance companies domiciled in the U.S.A., one to be chosen by the Company, one to be chosen by the retrocessionaire, and the third by the two arbitrators so chosen within 30 days of their appointment. If either party refuses or neglects to appoint an arbitrator within 30 days after the receipt of written notice from the other party requesting it to do so, the requesting party may nominate two arbitrators who shall choose the third. Each party shall submit its case to the arbitrators within 30 days of the appointment of the arbitrators. The arbitrators shall consider this Agreement an honorable engagement rather than merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law. The decision of a majority of the arbitrators shall be final and binding on both parties. The expense of the arbitrators and of the arbitration shall be equally divided between each party. Any such arbitration shall take place in Wausau, Wisconsin unless some other location is mutually agreed upon.

7. On May 27, 1991, by letter forwarded to London's counsel and agent Lord Bissell & Brook, Chicago, Illinois, Wausau duly demanded arbitration and designated Mr. William W. Fox as its party arbitrator. The Lord Bissell & Brook firm, London's agent and counsel, acknowledged receipt of the said notice on June 6, 1991.

8. Pursuant to the provisions of the arbitration agreement cited in Paragraph 5 above, London was required to designate its party arbitrator within thirty (30) days of receipt of the demand for arbitration. London failed to designate a party arbitrator within the aforesaid thirty (30) day period, which expired on July 6, 1991.

9. On July 22, 1991, after the lapse of thirty (30) days from Wausau's demand for arbitration, London designated Mr. Robert F. Hall as their party arbitrator. The attempted designation of Mr. Hall was null and void for the following reasons:

a. Mr. Hall does not meet the qualifications for party arbitrators as set forth in the arbitration agreement, namely, that the arbitrators "shall be executive officers of insurance companies domiciled in the USA."

b. Mr. Hall does not meet the minimum qualifications of objectivity and impartiality for arbitrators. Mr. Hall is on record as a leading proponent of the view adopted by the London insurance market with respect to asbestos losses. In a number of articles and public speeches, Mr. Hall has articulated the London position that aggregated asbestos losses are not recoverable under excess of loss retrocession contracts in the absence of an undefined provision generally referred

to as the "Aggregate Extension Clause." Mr. Hall's public adoption and promotion of the London position disqualifies him for service on an objective and impartial arbitration panel.

c. The designation of Mr. Hall by London was not within the thirty (30) day period provided by the arbitration agreement.

10. Article XVII of the reinsurance treaties provide that if either party refuses or neglects to appoint an arbitrator within thirty (30) days, the requesting party may nominate two arbitrators, who shall choose a third arbitrator. On July 25, 1991, pursuant to Article XVII, Wausau duly designated Mr. Bradford W. Mitchell as London's party arbitrator. Mr. Mitchell is the Chairman of the Board and Chief Executive officer of Harleysville Insurance Companies and Harleysville Mutual Insurance Company and thus is fully qualified to serve on the arbitration panel pursuant to the terms of the parties' arbitration agreements. In addition, Mr. Mitchell has no business or positional stake in the outcome of the arbitration, nor any allegiances to Wausau or London.

11. On July 31, 1991, London confirmed that Mr. Hall was not an officer of an insurance company domiciled in the USA, but refused to abide by the terms of the parties' contracts by withdrawing Mr. Hall or accepting Mr. Mitchell. Subsequent to July 31 and at all times relevant, London has failed and refused to go forward with the arbitration with the panel as duly constituted pursuant to the parties' agreements.

12. Pursuant to the aforesaid "Service of suit Clause USA," the respondents agreed that they:

> ". . . at the request of the reinsured, will submit to the jurisdiction of any Court of competent jurisdiction with the United States and will comply with all requirements necessary to give the Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court."

The federal courts have held that under such "Service of suit" clauses that litigants agree to submit themselves to the forum chosen by the dissatisfied party. Perini Corp. v. Orion Insurance Co., et al., 331 F. Supp. 453, 454-55 (E.D. Cal. 1971). Accordingly, any attempt by London to remove this suit to federal court should be deemed a further breach of contract by London and be sanctioned accordingly by this Court.

13. Wausau is entitled to an order of the court, pursuant to Wisconsin Statutes Section 788.03 compelling London to go forward with the arbitration, and confirming the designation of Mr. Fox and Mr. Mitchell pursuant to the terms and conditions of the parties' agreement.

WHEREFORE, Petitioner Employers Insurance of Wausau prays for an order of this Court, pursuant to Wisconsin Statute Section 788.03:

1. Ordering and compelling respondents to arbitrate the parties' dispute according to the terms and conditions of the reinsurance treaties.

2. Enforcing the arbitration agreement between the parties, according to their terms, by confirming the appointment of Bradford W. Mitchell as party arbitrators for the respective parties.

3. Granting such further relief as the court may deem equitable.

Dated: August 19, 1991. STRAUB & SCHUCH

/s/_____
Robert S. Schuch
400 Westwood Drive
Wausau, Wisconsin 54402
(715) 847-8064
842038GC

- and -

Dated: August 19, 1991. ZELLE & LARSON

/s/_____
Dale I. Larson (#60422)
Lawrence T. Hofmann (#45998)
Brooks F. Poley (#185139)
33 South Sixth Street
City Center - Suite 4400
Minneapolis, MN 55402
(612) 339-2020

**ATTORNEYS FOR PETITIONER**
**EMPLOYERS INSURANCE OF WAUSAU**
**A MUTUAL COMPANY**

**Appendix "A"**

London Syndicates:

10, 15, 16, 32, 33, 35, 56, 57, 60, 69, 88, 91, 109, 122, 129, 131, 144, 153, 160, 164, 179, 205, 208, 210, 214, 219, 250, 290, 322, 347, 355, 371, 441, 452, 469, 484, 510, 531, 558, 568, 570, 584, 605, 636, 652, 670, 677, 695, 772, 782, 783, 793, 896, 912, 947, 952, 975, 990

London Market Companies:

A.A. Mutual Insurance Association Ltd.
Accident and Casualty Insurance Co. of Winterthur, Switzerland
Agrippina
Agrippina Versicherungs A.G.
Andrew Weir
Andrew Weir Insurance Co. Ltd.
Assicurazioni Generali
Assicurazioni Generali di Trieste e Venezia, Societa per Azioni
Assicurazioni Generali T.S. (London)
Banco
Bellafonte Insurance Co.
Bellafonte Insurance Co.
C.E. Heath & Co. (Agencies) Ltd.
Dei-Tokyo Fire & Marine Insurance Co. Ltd.
Eagle Star (S & E)
El Banco di Seguros del Estado
English & American
English & American Insurance Co. Ltd.
European General

European General Reinsurance Co. of Zurich
Excess
Excess Insurance Co. Ltd.
Excess Insurance Co. Ltd.
Fidelidad Insurance Co.
Fidelidad Insurance Co. of Lisbon
Fidelidade
Guildhall
Guildhall Insurance Co. Ltd.
H.S. Weaver
Instituto di Reaseguros do Brasil
L'Abeille Compagnie Anonyme d'Assurances
L'Abeille Compagnie Anonyme d'Assurances sur la Vie
La Preservatrice
London & Overseas
Mercantile & General
Mercantile & General Reinsurance Co. Ltd.
Milli Reassurans Turk Anonim
Milli Reasurans Turk Anonim Sirketi
National Casualty Co.
National Casualty Co. of America
National Casualty Co. of America Ltd.
Overseas Union Insurance Ltd.
Scottish Lion
Scottish Lion Insurance Co. Ltd.
Slater, Walker Insurance Co., Ltd.
St. Helens
St. Helens Insurance Co. Ltd.
The London & Overseas Insurance Co. Ltd. A/C
Transcontinentale
Turegum
Turegum Insurance Co. Ltd.
Turkish Pool

Valoise Fire
Valoise Fire Insurance Co.
Victory
Victory Insurance Co. Ltd.
Yasuda
Yasuda Fire & Marine Reinsurance Co. Ltd.
Yasuda "T"

**EXHIBIT F**

Leslie & Godwin
LESLIE & GODWIN LIMITED
*Lloyd's Insurance Brokers*

El Banco de Seguros Del Estado
c/o Argenhall S.A.
Lavalle 557 - 70 Piso
1047 Buenos Aires
Argentina

For the attention of the Claims Manager

21 August 1995

Re: Employers Insurance of Wausau
Second Excess of Loss - 1 July 1966 to 1 July 1973
Third Excess of Loss - 1 July 1971 to 1 July 1973
Your Ref: Unknown

Dear Sirs,

Attached for your reference is a copy of a letter we have received from Lord Bissell & Brook dated 11 August 1995, and enclosures, advising the current status of the arbitration proceeding in connection with the First Layer and also advising that the scope of the arbitration has now been extended to include the Second and Third Layers. Previously, LBB has only been requested to act on individual claims files to these higher Layers.

As you will note, your company, as a Reinsurer on the Second and Third Layers, has been declared a party to this latest arbitration proceeding and Lord Bissell & Brook has requested that you advise whether you wish them to represent you in this matter.

Would you kindly let us have your advices, by return, in order that we might provide LBB with instructions as respects representation in this proceeding. If they are not required to represent your company, please accept this letter as notification of this latest development.

Yours faithfully,

/s/_____
J P Cougnian
for and on behalf of
Leslie & Godwin Limited

encl.

**EXHIBIT G**

IN THE MATIER OF THE ARBITRATION BETWEEN

EMPLOYERS INSURANCE OF WAUSAU,

Claimant,

-against-

CERTAIN LONDON COMPANIES AND UNDERWRITERS AT LLOYD'S, LONDON,

Respondents.

Before:

William P. London
(Neutral Umpire)

Bradford W. Mitchell
(London - Party Arbitrator)

William W. Fox, Ir.
(Wausau - Party Arbitrator)

After full consideration of the arguments of the parties and their submissions, the Panel finds as follows:

That Employers of Wausau is entitled to receive from Respondents as full and final settlement for all Products Liability Bodily Injury losses arising from asbestos related claims under the following contracts the sum of $7,783,324, such amount to be distributed by contract as follows:

| Treaty Year | Excess of Loss Retrocessional Agreement (First Layer) | Award First Layer | Excess of Loss Retrocessional Agreement (Second Layer) | Award Second Layer | Excess of Loss Retrocessional Agreement (Third Layer) | Award Third Layer | Total Award |
|---|---|---|---|---|---|---|---|
| | | | | | | | |
| 7/1/66-67 | U70319, C/N10679; | $ 739,416 | U70320 | $ 560,399 | | $ | $ |
| 7/1/67-68 | U70319, C/N10679, U72200; | 669,366 | U70320 | 474,783 | | | |
| 7/1/68-69 | U70319, C/N10679, U75249; | 568,183 | U75250 | 482,566 | | | |
| 7/1/69-70 | U76690, C/N10679; | 521,483 | U76691 | 490,349 | | | |
| 7/1/70-71 | U76690, C/N17769, FTL000256; | 459,216 | 60011 | 521,483 | | | |
| 7/1/71-72 | U76690, C/N71244, FTL000780; | 311,333 | U71245 | 560,399 | FTL000782 | $233,500 | |
| 7/1/72-73 | U76690, C/N71244, FTL001237; | 342,466 | U71245 | 599,316 | 60012 | $249,066 | |
| | | | | | | | |
| Total | | $3,611,463 | | $3,689,295 | | $482,566 | $7,783,324 |

Each reinsurer tendering its share under each of the above contracts shall receive a full and final release from Employers for all Products Bodily Injury losses arising from asbestos related claims under such contracts.

If such amounts are not tendered by London respondents, either individually or collectively, within 45 days of the date of this award, the Panel makes the following additional awards:

1) Interest from the date of this award at a compound annual rate of 7.5%;

2) Attorneys fees and costs of $930,730 for which London respondents are jointly and severally liable;

3) At the expiration of a period of 45 days following the date of this award, London respondents shall provide a Letter of Credit to Employers of Wausau in the amount of $9,000,000 in a form acceptable to the Wisconsin Insurance Department and to secure payment of the ultimate liability in this matter.

The foregoing award is entered this 18th day of September, 1995 by a unanimous decision of the Panel.

/s/_____
William P. London
(Neutral Umpire)

/s/_____
Bradford W. Mitchell
(London - Party Arbitrator)

/s/_____
William W. Fox, Jr.
(Wausau - Party Arbitrator)

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WISCONSIN**

[Filed September 16, 1998]

| | |
|---|---|
| EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY, *Petitioner*, | ) |
| v. | ) |
| BANCO DE SEGUROS DEL ESTADO, *Respondent*. | ) |

## RESPONDENT' S ANSWER

Respondent, EL Banco de Seguros del Estado, through its undersigned counsel, Answers the Petition, and pursuant to the Inter-American Convention on International Commercial Arbitration, ("IACICA") 9 U.S.C. Sec.'s 301-307, and the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. Sec.'s 1602-1611, seeks an order denying the petition and vacating the underlying arbitration award and vacating said arbitration award.

## PARTIES

1. Admits.

2. Admits and further alleges that for all relevant times up to and including the present, this has been Respondent E1 Banco de Seguros del Estado's ("Banco")

principal place of business. It has not moved. It further alleges that this case is subject to the provisions of the FSIA.

**JURISDICTION AND VENUE**

3. Admits.

4. Admits.

5. Admits.

**BACKGROUND**

6. Admits that Banco entered into the referenced "Treaties" and that said Treaties speak for themselves.

7. Admits.

8. Admits that the Treaties contained a "Service of Suit Clause (USA)" and that same speaks for itself.

9. Admits the allegations contained in the first sentence. As to the rest, lacks sufficient knowledge or information in order to form a belief as to the truth of the allegations. However, respondent alleges and asserts that there is no language in the Treaty which authorizes a substitute "intermediary".

10. Upon information and belief admits the allegations contained in paragraph "10", except denies that Lord, Bissell & Brook represented Banco; and further denies that Banco participated in the audit and that the audit was performed on its behalf.

11. Upon information and belief admits the allegations contained in paragraph "11", but denies that any provision of the Treaties that Banco signed authorized Wausau to serve a demand for arbitration solely upon Lord, Bissell & Brook.

12. Upon information and belief admits the allegations in paragraph "12" but repeats and realleges the denials contained in paragraph "11", and denies that Leslie & Godwin notified Banco at its principal place of business, set forth in paragraph "2".

13. Denies that the notice was sent to Banco's principal place of business, set forth in paragraph "2", or that Banco received notice by any other means.

14. Repeats and realleges the allegations contained in paragraph "13" but makes the denials applicable to the alleged fax.

15. Lacks information and knowledge sufficient to form a belief as to the truth of these allegations; however, denies that Banco's correct name is set forth in Appendix "A", attached to Exhibit "E"; and, denies that Banco received notice of the appointment of party arbitrators and notice compelling Banco to proceed with the arbitration.

16. Denies the allegations as pled, as they imply that Banco had knowledge of the removal, when Banco was unaware of any of these proceedings.

17. Upon information and belief admits the allegations in paragraph "17", but denies that Banco was aware of any part of the proceedings.

18. Repeats and realleges the allegations set forth in paragraph "17" and specifically denies that Banco was aware that the "ensuing arbitration was conducted over the summer of 1995."

19. Denies that the letter was sent to Banco's principal place of business or that Banco ever received this notice.

20. Upon information and belief admits the allegations in paragraph "20", but denies that Banco ever received notice of the arbitration, or, that Banco was allowed to name its arbitrator, or that Banco was ever allowed to present its own defense; or had the forty-five day option, after the award was firm and final, in which to pay off Banco's share and avoid, interest, attorneys' fees and the opening of a letter of credit.

21. Upon information and belief admits that Banco's share of the arbitration award was $181,319.00 and denies that Banco ever received timely notice of same and therefore denies the rest of the allegations of paragraph "21".

22. Upon information and belief admits the allegations in paragraph "22" but denies that Banco ever had timely notice of said motion or that it was represented by Lord Bissell & Brook.

23. Upon information and belief admits that on or about October 29, 1995, the Marathon County Circuit Court entered a Final Judgment, but denies that Banco ever had notice of these proceedings or that Banco is from "Rio de Janeiro, RJ, Brazil" as is indicated in said Final Judgment.

24. Upon information and belief admits the allegations of paragraph "24", but denies that Banco received notice of, or was aware of, the appeal.

25. Denies, and repeats and realleges that Banco never received notice of any of the proceedings set forth in this petition at its principal place of business, as identified in paragraph "2".

26. Admits.

27. Admits the allegations of paragraph "27" except for those in the last sentence, which it denies, as there are grounds for refusal in Article 5 of the IACICA, as Banco never received notice of the arbitration; or was allowed to appoint a party arbitrator; and/or was not allowed to present its defense.

WHEREFORE, El Banco de Seguros del Estado respectfully requests that the Court dismiss the petition and enter judgment on the award in favor of El Banco de Seguros del Estado, pursuant to Article 5 of the Inter-American Convention, by providing:

1. El Banco does not owe Wausau the amount of $181,319.00;

2. El Banco does not owe Wausau any interest payments;

3. El Banco is not liable for any of Wausau's attorneys fees and costs; and,

4. El Banco is not required to open a letter of credit as requested by Wausau.

**FIRST AFFIRMATIVE DEFENSE**

28. El Banco repeats and realleges the allegations set forth in paragraphs "1" through "27".

29. No notice of the within demand for arbitration, the appointment of party arbitrators, the scheduling of the arbitration, were ever sent to Banco at its principal place of business in Montevideo, Uruguay. Banco never received actual notice of the arbitration.

30. Banco was not allowed to otherwise present its defense in the subject arbitration.

31. The Treaties entered into by and between Petitioned and Banco did not contain any provisions for actual notice, nor did they contain the "special arrangement for service" that is set forth in the FSIA Sect.ion 1608(a).

32. Petitioner did not serve Banco in accordance with the provisions of FSIA Section 1608(b)(1-3).

33. Under the Inter-American Convention's (IACICA) Article 5(1)(b), an award may be refused enforcement where a party does not receive proper notice or is otherwise not allowed to present its defense. Banco is entitled to refuse the award on both grounds.

WHEREFORE, El Banco de Seguros del Estado respectfully requests that this Court enter an Order vacating the arbitration award that Petitioner obtained against Banco pursuant to Article 5 of the Inter-American Convention.

Dated: September 15th, 1998

Byrne, Goyke, Tillisch & Higgins, S.C.

By: /s/_____
James A. Higgins
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**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WISCONSIN**

[Filed September 16, 1998]

No. 98 c 0521 C

| | |
|---|---|
| EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY, *Petitioner*, | ) |
| v. | ) |
| BANCO DE SEGUROS DEL ESTADO, *Respondent*. | ) |

**MOTION TO VACATE ARBITRATION AWARD**

NOW COMES the Respondent Banco de Seguros del Estado by James A. Higgins of Byrne, Goyke, Tillisch & Higgins, S.C. and Jorge W. Moreira and David A. Cobin of The Moreira Law Firm, PC, and move this Court pursuant to Rule 7 of the F.R.C.P. to vacate Petitioner's award. As grounds for the motion, Respondent alleges that it never received proper notice of the arbitration and was not permitted to present its defense and that pursuant to the Inter-American Convention this Court may refuse to enforce said award.

WHEREFORE, Respondent respectfully requests that this Court enter an Order vacating Petitioner's arbitration award against Respondent.

Dated: September 15, 1998

Bryne, Goyke, Tillisch & Higgins,S.C.

By: /s/_____
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